DOCUMENT RESUME

ED 238 776 SO 015 308

| | |
|---|---|
| AUTHOR | Smith, Melinda, Ed. |
| TITLE | Practical Law in New Mexico. |
| INSTITUTION | New Mexico Law Related Education Project, Albuquerque. |
| PUB DATE | Jan 82 |
| NOTE | 50p. |
| AVAILABLE FROM | New Mexico Law Related Education Project, P.O. Box 25883, Albuquerque, NM 87125 ($3.50). |
| PUB TYPE | Guides - Classroom Use - Materials (For Learner) (051) -- Guides - Classroom Use - Guides (For Teachers) (052) |
| EDRS PRICE | MF01/PC02 Plus Postage. |
| DESCRIPTORS | *Civics; Civil Rights; Consumer Protection; Criminal Law; Delinquency; Employment; Family Life; High Schools; Housing; Laws; *Legal Education; Resource Materials; *State Government; Supplementary Reading Materials |
| IDENTIFIERS | Juvenile Justice System; *New Mexico |

ABSTRACT

This book was written for teachers and students as a New Mexico supplement to "Street Law: A Course in Practical Law" (West Publishing Company, 1980), a text used in many high school law classes. The book may also be used as a teacher and student resource for civics, government, and other courses in the high school curriculum, or lay people might find the book useful as a practical handbook on New Mexico law. The material is current as of January, 1982. The first seven chapters, each of which corresponds to a chapter in the "Street Law" text, deal with the following topics: introduction to law, criminal law, juvenile law, consumer law, family law, housing law, and individual rights law. An eighth chapter dealing with employment law in New Mexico is also included. (Author/RM)

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# PRACTICAL LAW IN NEW MEXICO

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50 015 308

January, 1982

## THE NEW MEXICO LAW-RELATED EDUCATION PROJECT

Sponsored by the State Bar of New Mexico and partially funded by a grant from the U.S. Department of Education, the New Mexico Law-Related Education Project conducts on-going activities to promote legal literacy in the schools in New Mexico. The project assists high schools in initiating courses in practical law and cooperates with the University of New Mexico School of Law in a course in which law students teach law classes in Albuquerque high schools. Teacher training workshops and an annual statewide mock trial competition are also sponsored by the project.

In cooperation with the New Mexico Department of Education the project has prepared a *Teacher Resource Manual for Civics* and *Law in U.S. History: A Teacher Resource Manual.*

Other project publications include: *New Mexico Courts: Information and Ideas for Teaching* and *The Don't Panic Book: What to Expect in an Encounter with the Police and the Juvenile Justice System in New Mexico.*

For more information, contact the New Mexico Law-Related Education Project, State Bar of New Mexico, 1117 Stanford Avenue NE, P.O. Box 25883, Albuquerque, New Mexico 87125. Phone: (505) 842-6136 or 1-800-432-6976 (in-state WATS)

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## ACKNOWLEDGEMENTS

Appreciation is due to the attorneys who volunteered their time in preparing the drafts of the chapters and to the Young Lawyers Division for their initial assistance in the project.

A special note of appreciation is extended to Susan Albright for her talent in creating the illustrations and her diligence throughout the project; and to Lisa Eisenberg for her competence and enthusiasm in directing the production of the manuscript.

Appreciation is also extended to Jean Craven, Social Studies Coordinator of Albuquerque Public Schools.

In addition, thanks are due to the following for their financial support of the New Mexico Law-Related Education Project: New Mexico State Bar Foundation, Albuquerque Bar Association, Bar Association of the First Judicial District, Gulf Oil Corporation, Public Service Company of New Mexico, Albuquerque Public Schools, Belen Consolidated Schools, Cloudcroft Municipal Schools, Deming Public Schools, Grants Municipal Schools, Hatch Valley Municipal Schools, Las Cruces School District, Los Alamos School Board, Mountainair Board of Education, Kastler, Erwin and Davidson, Keleher and McLeod, Modrell, Sperling, Roehl, Harris and Sisk, Montgomery and Andrews, Parker, Wellborn and Wiggins, Smith, Ransom and Gilstrap, and Sutin, Thayer and Browne.

## INTRODUCTION

This book was written for teachers and students as a New Mexico supplement to *Street Law: A Course in Practical Law* (West Publishing Company, 1980), a text used in high school law classes in a number of districts in the state. There are chapters corresponding to each chapter in the *Street Law* text which provide information on laws and legal procedures within New Mexico. An additional chapter on employment law is included for teacher and student use.

The book may also be used as a teacher and student resource for civics, government and other courses in the high school curriculum. Lay people might also find the book useful as a practical handbook on New Mexico law. The material is current as of January, 1982. Readers should be aware that the laws are subject to change by future legislatures and by interpretation by the courts.

Assistance in the format of the book was provided by the National Street Law Institute, Washington, D.C., the organization which developed a model program in which law students teach courses in practical law in high schools.

The book is a collaborative effort initiated by the New Mexico Law-Related Education Project with assistance from the Young Lawyers Division of the State Bar of New Mexico. Nine attorneys wrote the drafts of chapters on which the book is largely based.

# Table of Contents


CHAPTER 1: INTRODUCTION TO LAW

What is Law? . . . . . 1
Who Makes the Law? . . . . . 2
Types of Law . . . . . 4
Juries . . . . . 5
New Mexico Courts . . . . . 5
Choosing a Lawyer . . . . . 6

CHAPTER 2: CRIMINAL LAW

Crimes . . . . . 7
Defenses . . . . . 7
Criminal Justice Process . . . . . 9
Corrections . . . . . 12

CHAPTER 3: JUVENILE LAW

Juvenile Justice System . . . . . 13
Status Offenders or CHINS . . . . . 15
Neglected or Abused Children . . . . . 16
Recent Developments in Juvenile Law in New Mexico . . . . . 16

CHAPTER 4: CONSUMER LAW

Contracts . . . . . 18
Credit . . . . . 19
Default and Reposession . . . . . 20
Deceptive Sales Practices . . . . . 20
Consumer Redress . . . . . 21

CHAPTER 5: FAMILY LAW

Marriage . . . . . 23
Ending Marriage . . . . . 24
Rights and Duties of Parents and Children . . . . . 25
Foster Care and Adoption . . . . . 26
Wills and Inheritance . . . . . 27

CHAPTER 6: HOUSING LAW

Renting a Home . . . . . 28
Buying a Home . . . . . 31

CHAPTER 7: INDIVIDUAL RIGHTS LAW

Freedom of Speech and Association . . . . . 33
Freedom of Religion . . . . . 34
The Right to Privacy . . . . . 35
Due Process of Law . . . . . 35
Discrimination . . . . . 36

CHAPTER 8: EMPLOYMENT LAW

The Young Employee . . . . . 38
The Employment Contract . . . . . 39
The Rights of Workers . . . . . 39
Unemployment Compensation . . . . . 40
Workers' Compensation . . . . . 41
Social Security and Retirement . . . . . 41
Occupational Health and Safety . . . . . 41
Employment Discrimination . . . . . 42
Grievance Procedures . . . . . 43

# Chapter 1

# Introduction to Law

GIVE A HOOT DON'T POLLUTE
DON'T CUT STUDENT LOANS!
GIVE KIDS A CHANCE
FRED'S THREADS
ANNUAL GOING OUT OF BUSINESS SALE
BIG SAVINGS
ONE WAY
CUT OUT THE YELLING, YOU'RE MAKING TOO MUCH NOISE!!
I'M NOT LOITERING, I'M JUST HANGIN' AROUND.
QUIET APT. FOR RENT NO PETS
CORNER BUTCHER
STOP! THIEF!

## WHAT IS LAW?

Every day you come into contact with laws. For example, if you drive a car you must obey traffic laws, and you expect others to obey them also. What happens when traffic laws are not obeyed? If you run a red light, you may get a traffic ticket for violating the law, and have to pay a fine. But your involvement with the law doesn't necessarily stop there. If you were drinking while driving your car, you might also get a ticket for driving while intoxicated. If you run into someone in the intersection, you may be sued by that person for the damage to his or her car, and for any personal injuries you caused. If the accident kills someone in the other car or in your car, you could face criminal charges of vehicular homicide, and a civil suit for wrongful death.

Driving is just one example of how laws touch our lives. There are many other ways. If your landlord doesn't return your security deposit when you move out, is there a way you can get it back? What happens if you write a check and the check bounces? If you buy a stereo that doesn't work, can you make the seller or manufacturer fix it or replace it?

Laws help us find the answers to these and many other questions. Laws are developed by all societies to help settle conflicts

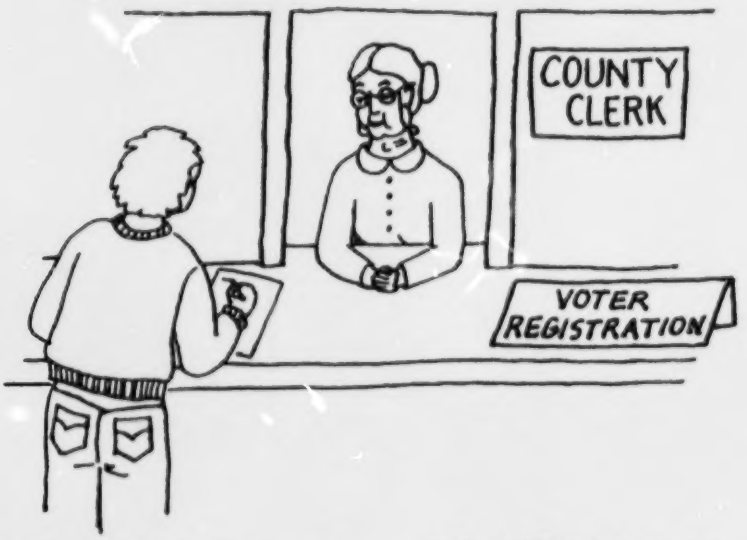
between people and to regulate individual and group behavior. If the laws are applied equally to everyone, and if the laws are reasonable and fair, the results will be fair. What is fair doesn't depend simply on the law as it is written in lawbooks. It depends on the way the law is applied to a particular situation. For instance, does it make a difference whether a bad check is written by mistake instead of with an intent to cheat the store owner? It makes a big difference. If the check was written by mistake, you will be responsible for the amount of the check and the penalty for bad checks that the store owner may charge. If that check was written knowing that it was bad, and you intended to cheat, then a crime has been committed. The state can fine you and put you in jail. Are the different results fair?

## WHO MAKES THE LAW?

Laws are made by elected representatives, judges and administrative agencies within the guidelines of the state and federal Constitutions. Because we do not always know all the effects of a law when it is passed, and because laws affect almost everything we do, it is important and sometimes difficult to make good laws.

**Elected Representatives**
In New Mexico, all power to make state laws rests in the State Senate and House of Representatives. New Mexico voters elect members of the House from 70 districts and members of the Senate from 42 districts.

The New Mexico State Legislature meets in Santa Fe for 60 days in odd-numbered years and 30 days in even-numbered years. The 30 day sessions can consider only budget matters, bills recommended for consideration by the governor, and bills from past sessions that were vetoed by the governor. The 60 day sessions can consider any kind of legislative matter.




The laws enacted by the State Legislature are called *statutes.* These statutes are published in a series of volumes called *New Mexico Statutes Annotated(1978).* They can be found at the University of New Mexico School of Law library, the Supreme Court Law Library in Santa Fe, district court law libraries, and in some public and university libraries.

City and county commissions or city councils are also elected groups but they pass laws on the local level. They consider laws having to do with zoning, building codes, taxes, and bonds to pay for city projects, among other things. Laws passed by city and county governments are called *ordinances.*

**The People**
The people of the state have the power and right to influence the enactment of some laws through a procedure known as a *referendum.* In this procedure the people vote to accept or reject a law.

People can also influence the lawmaking process through voting. In New Mexico, there are no residency requirements for voting, but voters must register 45 days prior to an election. The county clerk is the chief registrar in every county in the state, but deputy registrars are also appointed. A person who wants to register should call the county clerk's office.

A voter who fails to vote in the most recent general election (held every two years) will receive a notice of suspension of registration and an application for reinstatement. If the voter does not respond within 60 days, he or she will be removed from the register.

**Administrative Agencies**
Elected representatives pass some laws that create agencies that are staffed by people who are not elected but appointed or hired. These agencies administer technical areas of the law. For example, in New Mexico we have the Department of Health, which investigates diseases, establishes the duties of public health nurses and school nurses, and maintains and enforces rules and regulations necessary to carry out the provisions of the Public Health Act. The Public Service Commission regulates the public utilities in New Mexico, such as the Gas Company of New Mexico and the Public Service Company of New Mexico. The Public Service Commission decides what rates the utilities will be allowed to charge their

**"YOU MIGHT BE SURPRISED TO LEARN THAT AGENCIES MAKE MANY MORE LAWS AND REGULATIONS THAN ALL OTHER BRANCHES OF THE GOVERNMENT COMBINED."**

customers and what regulations the utilities should obey.

The rules made by administrative agencies are called *regulations.* These rules may be challenged in court suits or changed by the Legislature or city and county commissions, or sometimes by the executive branch or other agencies.

When creating an administrative agency, the Legislature only outlines the duties and responsibilities of the agency. The agency has extremely broad powers to make rules, to determine when regulations have been broken, and to punish those who break the regulations. You might be surprised to learn that agencies make many more laws and regulations than all other branches of the government combined. This book will deal principally with laws passed by elected officials and interpreted by the courts.

**The Constitution**

All statutes, ordinances, and regulations must be consistent with both the United States Constitution and the New Mexico Constitution to be valid. No state law can conflict with the State Constitution, nor may the State Constitution conflict with the U.S. Constitution. An amendment to the State Constitution may be proposed by a majority of both houses of the Legislature – the Senate and the House of Representatives. If a majority of each house agrees on the amendment, it is then submitted to the people of New Mexico for a vote. If the people *ratify* (approve) the amendment, it will become a part of the Constitution.

The entire State Constitution can be revised or amended by a constitutional convention. In order to call a constitutional convention, two-thirds of the members of each house of the Legislature must vote in favor of a convention. If that is done, the people of the state must then vote in favor of the convention. If they do, the next session of the Legislature will pass a law calling for the convening of the constitutional convention. Delegates from all over the state are elected to serve as representatives to the convention to decide on the revisions. Once the new Constitution is written by the convention, it must be submitted to the people for ratification. New Mexico held a constitutional convention in 1969. The new, revised Constitution was then submitted to the people for ratification. They voted not to ratify it.

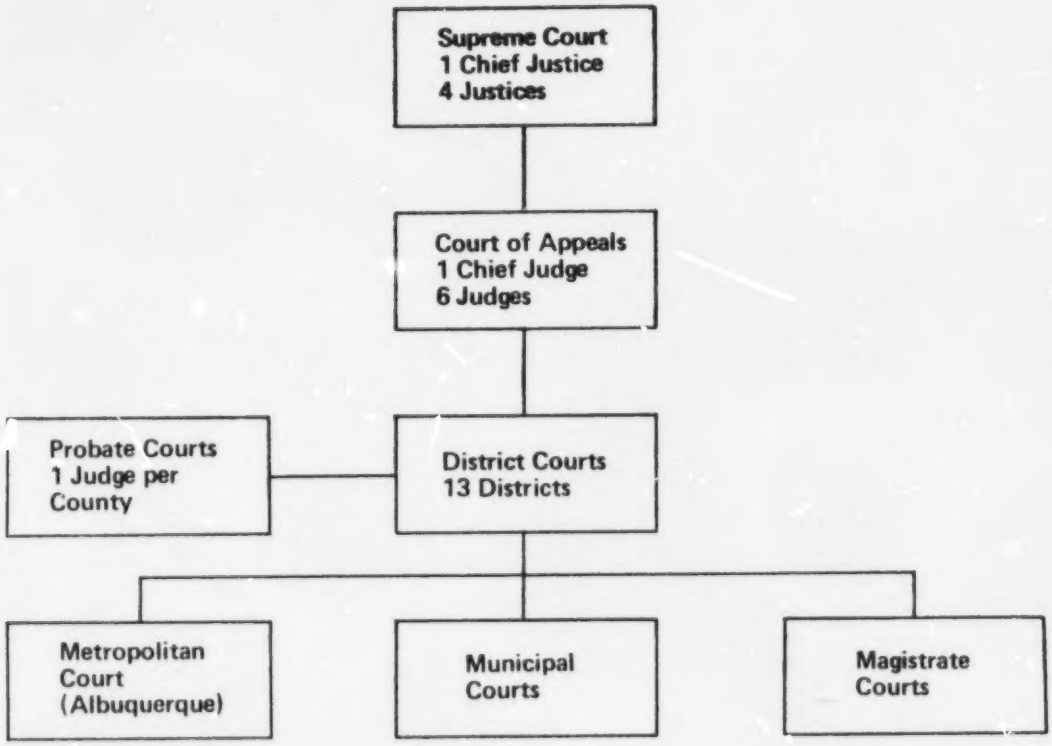
**Judges and Courts**

Courts make laws in two important ways. First, if a dispute arises between people that involves the interpretation of a statute, ordinance, or regulation, the people may go to court to find out the meaning of the law.

For instance, both the United States Constitution (Fourth Amendment) and the New Mexico Constitution (Article II, Section 10) provide that the people shall be protected against unreasonable searches and seizures. What does this mean? If someone is stopped for a traffic violation, can the policeman demand to search the trunk of the car? If a policeman is in "hot pursuit" of a person he saw rob a bank, can he follow that person into his private home? If a police dog, trained to find heroin, reacts to a suitcase on an airport conveyor belt, can the police search that suitcase on the spot? None of these questions is specifically answered in either the United States or the New Mexico Constitutions. The Fourth Amendment says: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause . . . and particularly describing the place to be searched and the persons or things to be seized." It is up to the courts to determine the meaning of this law in each of the different situations described above. This determination is made during the process of trial and appeal, as will be explained later. Once the court has determined the meaning of the law as it applies to each situation, the court's interpretation is as much a part of the law as are the original words used in the Constitution.

A second way that courts make law is by deciding disputes between people in areas where no statutes, ordinances, or regulations apply. For example, if Jones is in an automobile accident with Smith, who has to pay to repair the damages to each car? There is no statute that says who has to pay. If the case ends up in court, the court would decide who was responsible for the accident and who would pay for the damages. In making this decision, the court would apply a rule of law which has developed over many years by courts to determine who pays damages. Most likely the rule of law that the court would apply is that of *negligence,* which says that one person who causes an accident because he or she did not use reasonable care must pay for the damages resulting from the accident. The court would make a decision in this case based on earlier cases involving accidents where the rule of negligence was applied.

## NEW MEXICO COURTS




This legal rule of negligence is part of a body of court-made law known as *common law.* It is not found in statutes or ordinances. In this system judges make decisions about cases based on what other judges have decided in similar, earlier cases. The rules of the common law have been developing for many years and have their origins in English law. The decisions of judges are recorded in law books that judges and lawyers can read to help them develop arguments or form opinions about the cases on which they are working.

By deciding a new case as prior cases were decided, judges are following judicial *precedent.* If the facts of a new case are a little different from all of the precedents, the judge will pick and choose among previous cases to find the most helpful legal reasoning and the fairest outcome. Precedents are important to the functioning of the law. Lower courts will follow the precedents of higher courts, unless the lower court's decision explains convincingly how the case is different from the precedent. The ability of the common law to allow for change permits it to be flexible and to change when new fact situations of cases arise.

The Legislature can pass laws to change the common law, and the courts can overrule prior common law decisions. For example, in New Mexico there was a common law doctrine of *sovereign immunity.* This meant that government agencies could be protected from being sued for negligence, even if they actually were negligent. The doctrine of sovereign immunity dated back to the common law in England when a king, or sovereign, did not have to be accountable to anyone. The New Mexico courts decided that the doctrine was unfair and ruled that it should be abolished. The Legislature then passed a law called the New Mexico Torts Claims Act, which limits and describes situations in which the government can be sued for negligence.

### TYPES OF LAW

**Criminal Law**
Criminal laws are passed for the protection of society. They prohibit conduct that is dangerous or offensive to the public as a whole. In a criminal case, a district attorney will bring the accused person to trial. The District Attorney is an elected official, paid by the state, who represents the state in the court courtroom. His or her function is to see that a guilty defendant is fined or jailed. The title of a typical criminal case in New Mexico would read *State of New Mexico v. Jones,* Jones being the criminal *defendant.*

**Civil Law**
When the state has an interest in the fair resolution of a dispute, that dispute will be resolved in a civil case. For instance, suppose Smith hires Jones to build a house. If Jones doesn't lay a proper foundation

and the walls crack, Smith may sue Jones in a civil case. If Smith should win his case, the judge will not order criminal penalties such as a fine or imprisonment. Rather, the judge may have Jones pay Smith enough money to compensate him for his financial injuries. The title of the civil case would be *Smith v. Jones.*

## JURIES

In criminal trials, the defendant decides whether or not there will be a jury. In a civil trial, either the plaintiff or defendant can request a jury.

The types of civil trials that can have juries are set by the legislature. Disputes over contracts and tort actions, for example, may have juries, but cases involving workers' compensation or welfare benefits may not.

In New Mexico, the law requires that 12 people serve on a jury in a criminal trial. Juries for civil trials usually have 12 people, but the parties may also request a jury of six people. In a criminal trial, the decision of the jury must be unanimous. In a civil trial, if there are 12 jurors, only 10 of them must agree. If, however, six persons are used on the jury, all six must agree.

Jurors are selected from registered voters in the state and by law they must be paid the minimum wage for the time they serve.

## NEW MEXICO COURTS

**Municipal Courts**
At the local level in New Mexico are the municipal courts. Their *jurisdiction,* or authority, extends to all offenses under city law, including traffic violations.

**Magistrate Courts**
In every county in the state there is at least one magistrate court. In Bernalillo County municipal and magistrate courts have been combined into one Metropolitan Court. Magistrate courts have jurisdiction over limited types of civil and criminal matters. Their jurisdiction is determined in criminal cases by the amount of damages claimed. *Misdemeanors,* crimes that carry a penalty of imprisonment for less than one year and/or a fine of not more than $1,000, are handled in magistrate court. For civil cases, the limit on claims in magistrate court is $2000, and in metropolitan court, $5000. Certain types of cases are excluded from magistrate court, including real estate and domestic relations cases.

**District Court**
The district court is the state court of general jurisdiction.

There are 13 judicial districts in New Mexico, each having a district court that has one or more divisions and one or more judges. Albuquerque, for example, is in the Second Judicial District, for which there are 14 separate divisions and judges. District courts hear both civil and criminal cases. They hear *felony* cases, crimes that may be punished by more than one year in prison and more than a $1,000 fine. In civil cases, they handle law suits in which damages sought are over $2,000 ($5,000 in the Second Judicial District). District courts also handle domestic relations cases, adoptions, and contested estate cases. They also hear appeals from magistrate court.

**Court of Appeals**
Most cases appealed from the New Mexico district courts are heard by the New Mexico Court of Appeals. The types of cases it can hear are specified by the legislature and include most criminal appeals, appeals from state agency decisions, and tort claims.

**Supreme Court**
The New Mexico Supreme Court is the highest appellate court in the state. It may review the decisions of the Court of Appeals as well as hear appeals of decisions of the district courts. Cases heard by the Supreme Court can be appealed to the United States Supreme Court.

**Federal Courts**
In addition to the state courts, there is a federal court system in New Mexico. The federal courts handle cases dealing with federal law or cases in which parties come from different states. The federal courts also handle many cases involving Indians on Indian reservations. Major felonies committed by Indians on Indian land are handled

by the federal courts. Indian tribes in New Mexico have their own tribal courts, which generally handle misdemeanors and civil cases involving domestic relations, inheritance, and tort actions.

Federal district courts are located in Albuquerque and Santa Fe. Cases tried in these courts can be appealed to the 10th Circuit Court of Appeals. From here, cases go directly to the United States Supreme Court if it chooses to review them.

## CHOOSING A LAWYER

If you think you might need a lawyer, for either a criminal or civil matter, how do you go about choosing one? Friends or family might be able to recommend a lawyer to you. Advertisements in the newspaper and Yellow Pages can help you identify lawyers and what their specialties are, but you will have no way of telling how good they are. You can also use the following services and associations.

**Albuquerque Bar Association**
If you live in Albuquerque, the local bar association maintains a referral service for people who need legal assistance. You may call the association at 243-2615 and they will set up an appointment with an attorney on their referral list. You must take the attorney they assign to you, and the first consultation of 30 minutes will cost $20. If your legal problem cannot be solved in that period of time, you can continue with the attorney's services. If for some reason you do not want to retain the attorney, you are under no obligation to do so.

**Local Bar Associations**
If you live in the Santa Fe area, the bar association of the First Judicial District maintains the same type of referral service called the Santa Fe Lawyer Referral. You can contact the service at 982-2737.

Local bar associations in other areas of the state can probably assist you in locating a lawyer for your particular needs. There are local bar associations in the following counties: Chavez, Colfax-Union, Curry, Dona Ana, Eddy, Grants, Lea, Lincoln, McKinley, Otero, San Juan, Valencia, Fourth Judicial District (Las Vegas), and Sixth Judicial District (Deming and Silver City). Call the local courthouse to find the names of current officers for these associations.

**Legal Aid and Legal Services**
If you cannot afford an attorney, what can you do? There are government-funded legal services offices throughout the state that take clients who meet federal income guidelines. These offices take only civil cases and cannot handle cases in which the client seeks damages. If, however, your case cannot be taken, legal services attorneys can refer you to private attorneys who might take your case on a *contigency* basis. This means that an attorney will not charge you for legal services, but will take a percentage of the damages paid to you if you win the case.

A list of legal services offices in New Mexico follows: Legal Aid Society of Albuquerque; Northern New Mexico Legal Services with offices in Espanola, Taos, Las Vegas, and Santa Fe; Southern New Mexico Legal Services with offices in Clovis, Carlsbad, Las Cruces, Roswell, Silver City, and Socorro; and Indian Pueblo Legal Services, Inc. with offices in Laguna, San Juan Pueblo, Santa Ana Pueblo, and Zuni.

What if you have a complaint against your lawyer? Perhaps you think the lawyer has charged too much or has neglected your case. Or perhaps you did not think he or she was qualified to handle the case. You should file a written complaint with the Chief Bar Counsel, whose name and address you can get either from the State Bar of New Mexico, 842-6132 or from the Supreme Court, 827-2771.

If it is likely that your lawyer has violated the Code of Professional Responsibility, he or she will have to appear at a hearing. Attorneys risk temporary or permanent suspension of their licenses to practice law.

**THERE ARE GOVERNMENT-FUNDED LEGAL SERVICES OFFICES THROUGHOUT THE STATE THAT TAKE CLIENTS WHO MEET FEDERAL INCOME GUIDELINES.**

# Chapter 2

# Criminal Law

## CRIMES

The New Mexico Legislature has determined which acts are considered criminal. Crimes and their penalties are described in the New Mexico Statutes in what is known as the Criminal Code.

Crimes are classified according to their level of seriousness. In New Mexico there are three types of crimes: (1) capital offenses; (2) felony offenses; and (3) misdemeanors.

A *capital offense* is a crime for which a person may be sentenced to death. Currently in New Mexico there is only one such offense: first degree murder with *aggravating* circumstances. For example, killing a police officer on duty would be classified in this category.

A *felony* is any crime that is punishable by a term of one year or more in the Penitentiary of New Mexico. Examples of felonies are robbery, auto theft, burglary, drug trafficking, and vehicular homicide.

*Misdemeanors* are classified into *high court* and *petty* misdemeanors. Petty misdemeanors are punishable by a term of less than six months in a county or municipal jail while high court misdemeanors are punishable by a term of less than one year in a county jail. Driving while intoxicated, trespass, and simple assaults and batteries are examples of misdemeanors. The accompanying chart lists a number of crimes and their elements and penalties under New Mexico law.

## DEFENSES

In order to convict someone of a crime, the Constitutions of the United States and New Mexico require that the prosecutor prove that a person committed the crime beyond a reasonable doubt. If the prosecutor is unable to prove any material element of a crime then the jury must find the person not guilty of that crime.
There are several defenses that are called *affirmative defenses.* Affirmative defenses are those defenses that a defendant can raise to show that he is not guilty of a crime when in fact he committed the act that made up the crime. Self-defense, defense of property, defense of another, duress, mistake, insanity, and intoxication are typical affirmative defenses.

**Self-Defense**
In New Mexico, self-defense can be claimed to justify actions under the following circumstances:

(1) If a person reasonably believes that he or she is being threatened by another individual who is about to inflict bodily harm, that person may use *non-deadly* force to protect himself or herself.

(2) If a person reasonably believes that he or she is in danger of death or great bodily harm and that the use of *deadly force* is necessary to prevent it, that person may use deadly force. The danger of death or bodily harm must be immediate and unavoidable and a reasonable person would act in the same way in similar circumstances. A person may use deadly force to defend one's spouse or family, but not to defend one's property.

**Insanity**
Insanity can be used as a defense if it can be shown that (1) a person did not know the nature and quality of the act at the time of the criminal act, and (2) the person was not able to conform his or her conduct to the requirements of the law. The person must have a recognizable mental disease. It is rare that a defendant is acquitted by reason of insanity.

Insanity is also an issue in determining whether or not a defendant is competent to stand trial.

In order to stand trial, the defendant must have a rational understanding of the charges against him or her and have the ability to aid the attorney in the preparation of his or her defense. If competence is in question, attorneys for the prosecution and defense will present expert testimony and the judge will make a decision. If the defendant is found incompetent, he or she will

| OFFENSE | ELEMENTS | PENALTY |
|---|---|---|
| HOMICIDE: | | |
| Murder | Defendant deliberately intended to take away life; act committed with malice. | Death or life imprisonment |
| Felony Murder | Defendant killed the deceased while committing or attempting to commit a felony. | Death or life imprisonment |
| Second Degree Murder | Defendant killed the deceased knowing that his or her acts created a strong probability of death or great bodily harm. | Nine years imprisonment |
| Voluntary Manslaughter | Defendant killed deceased after having been sufficiently provoked. Defendant knew that acts created a strong probability of death or bodily harm. | Three years imprisonment |
| Involuntary Manslaughter | Defendant committed unlawful act not resulting in a felony or a lawful act with reckless disregard for the safety of others. Act resulted in death. | 18 months imprisonment |
| Vehicle Homicide | Defendant caused death while operating a motor vehicle while under the influence of intoxicating liquor or drug. | 18 months imprisonment |
| THEFT: | | |
| Robbery | Taking property from a person or person's immediate presence by force or by threatening to use force. | Three years imprisonment |
| Armed Robbery | Robbery with a deadly weapon. | Nine years imprisonment (first offense) 18 years imprisonment (second offense) |
| Burglary | Entering building or vehicle without authority and remaining without authority with the intent to commit a theft. | 18 months imprisonment |
| Larceny | Stealing anything over $2,500 in value. | Three years imprisonment |
| | Stealing anything over $100 but less than $2,500 in value. | 18 months imprisonment |
| | Stealing anything less than $100 in value. | Up to six months in county jail and/or $100 fine |
| Fraud | Intentionally taking or misappropriating property of another by fraudulent conduct. | Same as for larceny |

usually be sent to the Forensic Unit of the State Hospital in Las Vegas for treatment for 60-90 days. If failure to prove competence occurs again, the district attorney may dismiss the charges. The defendant may be committed to the State Hospital in civil proceedings.

**Intoxication**

Intoxication may be used as a defense for certain types of crimes. Voluntary intoxication can be a defense for only those types of crimes that require proof of a specific mental state, called *specific intent* crimes.

| OFFENSE | ELEMENTS | PENALTY |
|---|---|---|
| BODILY HARM: | | |
| Assault | Conduct placing another in reasonable fear of receiving a battery. Defendant has apparent ability to carry out threatened battery. | Up to six months in county jail and/or $100 fine |
| Aggravated Assault | Same as above and defendant has deadly weapon. | 18 months imprisonment |
| Battery | Defendant unlawfully touches another or applies force in a rude, insolent, or angry manner. | Up to six months in county jail and/or $100 fine |
| Aggravated Battery | Unlawful touching or application of force causing temporary, painful disfigurement. | Up to one year in county jail |
| | Unlawful touching or application of force that is likely to cause death or great bodily harm done with a deadly weapon. | Three years imprisonment |
| DRUG OFFENSES: | | |
| Possession of Marijuana | One ounce or less. | Up to 15 days in county jail and/or $50-$100 fine |
| | More than one ounce, less than eight ounces. | Up to one year in county jail and/or $50-$100 fine |
| | Eight ounces or more. | 18 months imprisonment |
| Distributing marijuana or possessing with the intent to distribute | 100 pounds or less. | 18 months imprisonment |
| | More than 100 pounds. | Three years imprisonment |
| Distributing controlled substances to a minor | Marijuana | Three years imprisonment |
| | Other substances (narcotics) | Nine years imprisonment |
| Delivery of drug paraphernalia to a minor | Minor must be at least three years younger. | 18 months imprisonment |

For example, if a man is charged with aggravated battery, it must be proved that he intended to cause great bodily harm. If he claims he was too drunk to have the required mental state (intent to do great bodily harm) to commit the crime, he may use intoxication as a defense.

If a person is involuntarily intoxicated, that is, gets drunk without knowing a substance is alcoholic and then commits a crime, intoxication can be a defense against any type of crime.

## CRIMINAL JUSTICE PROCESS

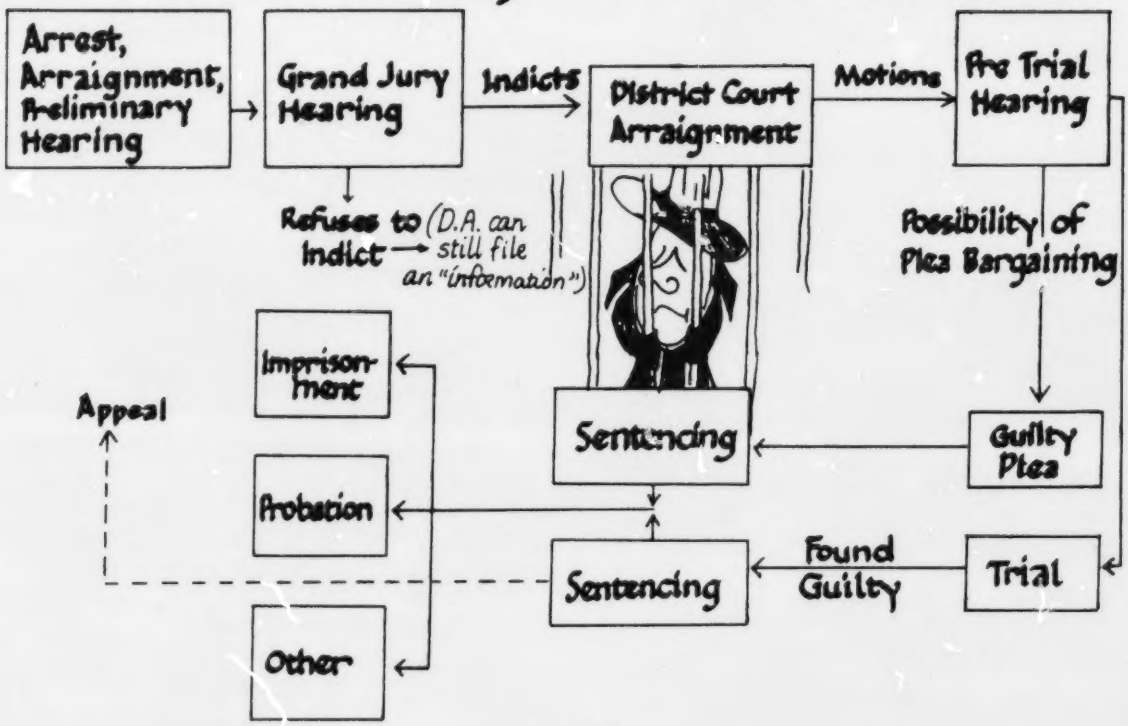
### Arrest

Since New Mexico is a multiple jurisdiction state, an individual may be arrested by different types of police depending upon where the person is when he or she is arrested. For example, federal and state police officers can arrest an individual who has violated one of the federal or state laws anywhere in the state of New Mexico. An Indian tribal policeman or a Bureau of Indian Affairs policeman may not arrest a non-Indian offender when that offender is not on Indian land. Other requirements such as probable cause to arrest and reasonable suspicion to stop and frisk are identical with the federal law. When a suspect is arrested, he or she is taken to a city-county detention facility where he or she is booked.

### Searches and Seizures

While the requirements for searches and seizures in New

# The Adult Criminal (felony) Law Process in New Mexico




From Civics by Susan Roberts, Betty Waugh and Anne Gonzales.
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Mexico follow federal law, there is one notable exception because the state shares a border with Mexico. The United States Customs office maintains a permanent check point on Interstate 25 south of Socorro. Officials have the right to stop cars and search them for undocumented aliens and contraband. A roving check point is also maintained near the Silver City area. Officials can stop cars at these check points so long as they stop *all* cars. They cannot single out certain cars to stop and search.

**Preliminary Proceedings**

Once arrested, the suspect is taken to magistrate court for arraignment as soon as possible to hear the charges against him or her and to be informed of his or her rights. If the suspect is eligible, the magistrate judge sets bond. The suspect has the right to be represented by a lawyer. If he or she cannot afford to hire one, the court appoints one. Lawyers from the office of the Public Defender or, in small towns, lawyers appointed by the court, represent *indigent* defendants.

In New Mexico, there are two different methods to charge a person with a felony. These are (1) a sworn statement by the district attorney called an *information* charging a person with a crime; and (2) a *grand jury indictment.* When an information is used, the defendant has a right to have a *preliminary hearing* before the magistrate. At this hearing, the prosecutor must convince the judge that there is probable cause to believe that the defendant committed the crime. This hearing must take place within 20 days of magistrate court arraignment if the defendant has posted bond, or within 10 days if he has not posted bond.

The magistrate may dismiss the case for lack of evidence or send the case to district court for trial. Whatever the magistrate does, the district attorney can carry the case farther.

The second method of bringing charges against a person is a grand jury indictment. New Mexico is one of 20 states that use the grand jury. At a grand jury hearing, evidence against the defendant is presented by the district attorney to a jury made up of 12 citizens. Eight of the 12 must agree that there is sufficient evidence to issue an indictment. The defendant has the right to testify before the grand jury and to have his or her lawyer present. The prosecution is required by law

to present any evidence that directly negates the guilt of the defendant. For example, if there is a witness who can provide an alibi for the defendant, this evidence must be brought out.

The next step after grand jury indictment or preliminary hearing is arraignment in district court. The defendant is required to enter a plea of guilty or not guilty, and in most cases, the defendant pleads not guilty.

After arraignment the defendant may enter into *plea bargaining* with the prosecuting lawyer. A defendant may be allowed to plead guilty to a lesser crime, or plead guilty to one or more charges in exchange for dropping other charges. Plea bargaining is used throughout New Mexico, and it is up to each district attorney's office to decide on its own policy.

**Trial**
If no plea bargain is reached, the defendant will be brought to trial. The trial must be held within six months of arrest or indictment. Only the Supreme Court of New Mexico may extend this time period.

The defendant may choose a trial by jury or by judge alone, but most defendants choose jury trials. The jury in a felony case is made up of 12 citizens selected from a panel by a process called *voir dire*. In this process, the attorneys or judge ask questions of the jurors to determine their qualifications to ensure a fair and impartial jury.

The prosecution must prove to the jury "beyond a reasonable doubt" that the defendant is guilty. The decision of the jury must be unanimous. If the jury cannot agree, the judge declares a mistrial and the state must decide whether to retry the case before another jury.

If a person is convicted, a sentencing hearing is held and a sentence is imposed. The defendant has the right to appeal his or her conviction.

**Sentencing**
Until 1977 New Mexico had an *indeterminate* sentencing law. This meant that the sentence is not stated in a specific number of years. For example, a person could be sentenced for one to five years for a particular crime and be eligible for parole after he or she has served one-third of the minimum sentence or 3.3 months.

The New Mexico Legislature passed a new sentencing law in 1977, amended in 1979, which provides for *determinate* sentencing. This law sets a fixed number of years for each degree of felony. For a first degree felony (e.g., kidnapping where the victim suffered great bodily harm) the basic sentence is 18 years. A second degree felony (e.g., armed robbery) carries a sentence of nine years. For a third degree felony (e.g., burglary) the sentence is three years, and for a fourth degree felony (e.g., vehicle homicide) the sentence is 18 months.

The judge can increase or decrease these basic sentences by as much as one-third depending on the circumstances of the defendant and the crime. For example, a person convicted of a first degree felony could serve a maximum of 24 years (18 years plus six years) or a minimum of 12 years (18 years minus six years).

Two other laws, the Firearm Enhancement Statute and the Habitual Offender Statute, provide for increases in basic sentences. Under the Firearm Enhancement Statute, the sentence for a person who is found to have used a firearm while committing a felony will be increased by one year for the first such offense and by three years for a second offense. Under the Habitual Offender Act, the basic sentence for a felony is increased by one year if there is one previous felony conviction, by four years if there are two previous felony convictions, and by eight years if there are three or more previous convictions.

In keeping with this trend toward stiffer penalties, the death penalty was brought back in New Mexico in 1979. The death penalty can be used for first degree murder with *aggravating* circumstances such as the following:

(1) the victim was a law enforcement officer killed on duty;

(2) the homicide took place

during a serious crime;

(3) the homicide was committed by a person escaping from jail;

(4) the homicide was committed by contract; and

(5) the victim was a witness to a crime and was killed to prevent him or her from telling what he or she saw.

## CORRECTIONS

The New Mexico Department of Corrections is responsible for the administration of all corrections facilities in the state. According to a state law that took effect in July, 1978, the department has the authority to classify inmates to determine which of the six adult corrections facilities the inmates will be sent to. Judges can make recommendations about where inmates should be sent, and they are highly considered, but the department has the final authority in this decision.

The State Penitentiary in Santa Fe is a maximum and medium security facility that has an inmate population of about 700 men and 20 women. The Central New Mexico Correctional Facility in Los Lunas is a medium security facility that currently holds about 480 men. The remaining facilities are minimum security. They are the Los Lunas Correctional Center, Camp Sierra Blanca in Capitan, Radium Spring's Womens Correctional Center, and Roswell Correctional Center.

For inmates imprisoned after the determinate sentencing law was passed a different system allowing for early release took effect to replace parole. Inmates can now get what is called *good time credit.* An inmate can get 10 days per month reduced from his or her sentence if no disciplinary action is taken against him or her. This is called *statutory good time.* If an inmate works in prison industries or participates in certain programs, he or she can get an additional 10 days per month reduced from his or her sentence for what is called *industrial good time.* An inmate can also get his or her term reduced through *meritorous good time* for certain actions, such as saving the life of a prison guard.

In 1977 *Duran v. Apodaca,* a class action suit on behalf of inmates, was filed against the state, claiming that certain conditions and practices at the State Peniteniary violated inmates' constitutional protections against cruel and unusual punishment (Eighth Amendment).

After a riot at the prison in February of 1980, attorneys for the inmates undertook negotiations with the Department of Corrections which resulted in a court ordered consent decree. The decree outlined an agreement between the parties concerning a variety of reforms of policies and conditions at maximum and medium security facilities in New Mexico. In part the decree outlined policies relating to:

(1) visitation of inmates' lawyers to discuss legal matters;

(2) monitoring of food services to insure adequate nutrition and sanitation;

(3) inmate access to law libraries, legal forms, and legal assistants;

(4) inmate visitation;

(5) classification of inmates;

(6) living conditions of inmates;

(7) comprehensive programming for each inmate, including training, work, and recreational opportunities;

(8) guaranteed medical services and psychiatric care;

(9) staffing and staff training;

(10) maximum security placement and conditions; and,

(11) inmate discipline and procedures for hearings and appeals.

The Department of Corrections is in the process of complying with a number of the provisions of the consent decree. Nevertheless, the conditions at the State Penitentiary remain a controversial issue in New Mexico because, according to official reports as of January, 1982, not all of the provisions have been met.

# Chapter 3

# Juvenile Law

In New Mexico, as in all states, children who have broken the law are treated in a different manner than adults who have broken the law. They are handled in a court that is called the Children's Court. In the Children's Court, violations of the law are referred to as *delinquent* acts rather than as crimes. In New Mexico, a delinquent is a child under 18 years old who commits a violation of the law. Some states have a lower age, such as 16 or 17.

The laws relating to children are contained primarily in what is called the Children's Code and in the Rules of Procedure for the Children's Court. The Children's Code consists of laws passed by the New Mexico Legislature regarding children. The Rules of Procedure for the Children's Court are rules adopted by the Supreme Court for use in Children's Court proceedings. These rules have the effect of law.

## JUVENILE JUSTICE SYSTEM

### Complaint

When a *complaint* against a child is made, it is first referred to the juvenile probation office rather than to the district attorney's office. This complaint may be a police report or it may be a written statement by a citizen in the community.

If arrested by a police officer, a child may be released by the officer to his parents. A police officer may also give the child a citation. A police officer may, however, take the child to the juvenile detention center or another detention facility. If a child is taken to a juvenile detention center, a probation officer usually makes a decision as to whether to release the child to his or her parents, or whether to hold the child in detention pending court proceedings.

### Preliminary Inquiry

Before formal charges can be filed, the probation office must hold a *preliminary inquiry*. At this meeting, the probation officer discusses the charges with the child and his or her parents and explains court procedure and possible penalties. After this meeting, the probation officer must make a recommendation on what action should be taken. The officer will take into consideration the seriousness of the offense, the child's attitude, the family situation, school record, previous record of delinquent referral, job history, and any other relevant factors.

The child's attorney may also be present at this inquiry but it is not required by law. If the child does not have an attorney, he or she has the right to request that the juvenile probation officer arrange to have one appointed. If a child and his or her parents cannot afford an attorney, one will be appointed at no cost from the office of the Public Defender. Many cases, especially those that involve minor offenses and children in trouble for the first time, are not sent to court. Frequently a child may be placed on unofficial probation, be required to do community service, or be referred to counseling or a juvenile program of some type.

### Formal Charges

If the probation officer recommends that charges be filed, the case is referred to the district attorney's office. The Children's Court attorney in the district attorney's office reviews police reports and other available information to decide whether or not to file charges. The Children's Court attorney can overrule the probation officer's recommendations. If the Children's Court attorney decides to file charges, a *petition* is filed which contains the name, age, address of the child, and a brief statement of what the child is accused of doing.

If a child is not released from custody, he or she is not entitled to bail; however, a child has a right to a *detention hearing* before the Children's Court judge to determine whether to continue to hold the child. The court considers:

(1) whether the child may commit injury to others or be injured;

(2) whether there is someone to provide adequate supervision and care; and,

(3) whether the child will appear for further court proceedings.

If the child is not released, he or she is entitled to a *release hearing* within five days from when his or her attorney demands it. At this hearing, the Children's Court attorney must show the court that there is "probable cause" that the charges are true. If the Children's Court attorney cannot prove probable cause, the charges are dismissed and the child is released. The standard of proof at the release hearing is much lower than the standard of proof necessary at trial.

**Adjudicatory Hearing**
If a child is not released, an *adjudicatory hearing* (equivalent to a trial) must be held within 30 days from when the petition was filed. This hearing will determine whether or not the child has committed a delinquent act.

The proceedings at a Children's Court hearing are almost identical to those of an adult criminal trial. The law provides that:

(1) the attorney for the child can subpoena witnesses;

(2) the attorney for the child can cross-examine witnesses;

(3) the case against the child must be proven beyond a reasonable doubt; and,

(4) the child is entitled to a jury trial if accused of a crime for which an adult is entitled to a jury trial.

A child who is accused of violating probation does not have a right to a jury trial, but the state must still prove beyond a reasonable doubt that probation was violated.

**Need of Care or Rehabilitation**
If a child admits the delinquent act, or if found guilty at the adjudicatory hearing, the child may demand a hearing on whether he or she is in need of care of rehabilitation. If a child is convicted of an act that would be a felony if he or she were an adult, it is presumed that the child is in need of care or rehabilitation. If a child is convicted, however, of a misdemeanor, the burden is on the Children's Court attorney to prove that the child is in need of care or rehabilitation. This means that there must be more evidence than the mere fact that the child committed the offense. In misdemeanor cases, if the Children's Court attorney cannot show a need for rehabilitation, the entire petition against the child is dismissed.

**Consent Decree**
Under the Children's Code and the Rules there is also a special type of agreement not found in other courts, called a *consent decree*. This is an agreement, made by the Children's Court attorney and the child's attorney and approved by the judge, to put a child who has been found to be delinquent on probation. If a child successfully completes the period of probation, the charges are dismissed and cannot be brought up again.

**Dispositional Hearing**
If a child, found to be delinquent, is not put on probation through a consent decree, a *dispositional hearing* is held. This is a hearing similar to a sentencing hearing for adults. A probation officer is usually assigned to write a predispositional report. In this report, based on interviews with people having knowledge of the child and information about past referrals to the juvenile probation office, the probation officer makes a recommendation about what should be done for the child. The Children's Court judge does not have to follow the recommendation. At the hearing, the child, the child's parents, the child's attorney, and any other interested person the child wishes may speak to the judge. After reading the predispositional report and listening to all of the persons who wish to speak, the judge makes a decision regarding what should happen to the child.

In New Mexico, the maximum punishment for a child sentenced under the Children's Code is confinement at either the New Mexico Boy's School in Springer, or the Girl's Welfare Home in Albuquerque. The average length of a commitment is about seven to nine months; however, it may be longer or shorter depending on a child's behavior. A commitment may be as long as two years for a child who has not been committed previously, or three years for a child who has had a previous commitment. The Boy's School and the Girl's Welfare Home makes recommendations to the Juvenile Parole Board, which makes the final decision on parole. After

release, the child is usually put on parole. This involves supervision by a parole officer who can counsel the child and assist him or her in staying out of trouble. If a child fails to live up to the conditions of parole, the child can be returned to either the New Mexico Boy's School or the Girl's Welfare Home after a parole hearing.

Other possible dispositions by the Children's Court judge include: sending a child to the Youth Diagnostic Center in Albuquerque for evaluation, placing the child in a group home, or sending the child to the Juvenile Detention Home for up to 15 days. The judge may also put the child on probation and may make certain conditions part of the probation. The judge might require attendance at an alcohol treatment program, counseling, community service, or restitution.

The judge has a large amount of discretion in deciding what disposition to make regarding a child. Of two children convicted of the same delinquent act, one may be sent to the New Mexico Boy's School, and the other may be given probation. One child convicted of burglary may be given probation while another child convicted of shoplifting may be sent to the New Mexico Boy's School at Springer.

**Transfer Hearings**
If a child commits a serious crime such as murder, rape, or armed robbery, he or she can be transferred after a hearing to the district court for trial as an adult.

Also, children who continue to commit felonies (crimes for which an adult could be sent to the penitentiary) can also be transferred after a hearing to the district court. The minimum age for transfer if the charge is murder is 15 years of age. For any other felony offense, the minimum age is 16 years.

**Appeals**
If a child has been convicted of committing a delinquent act, he or she has a right to appeal the case to the New Mexico Court of Appeals in Santa Fe. This is done when the child's attorney believes there has been some type of mistake made in the way the Children's Court interpreted the law. If the Court of Appeals disagrees with the decision of the Children's Court, it can reverse the decision. If the Court of Appeals finds that the Children's Court ruled correctly, it will affirm the decision. If the attorney for the child believes that both the Children's Court and the Court of Appeals have ruled incorrectly, the attorney can ask the New Mexico Supreme Court to review the decision.

**Juvenile Records**
The juvenile justice system offers an important protection regarding the destruction or sealing of records. If a child is processed through the juvenile probation office but no petition is filed, the record is automatically destroyed when the child turns 19. If a petition *is* filed against a child, that record is destroyed by the juvenile probation officer when the child turns 22.

However, these records are on permanent file in the Children's Court clerk's office. The child can petition the Children's Court to seal the records. A motion can be filed by the child's attorney after the child has turned 18 that asks that the court and arrest records be sealed. If the judge grants the motion, the records are sealed and the case is treated as though it never occurred. The records can only be unsealed by an additional court order. It is possible for someone with a legitimate interest, such as the army or potential employer, to petition the court to unseal the records. The court, of course, has the discretion to grant or deny the petition.

## STATUS OFFENDERS OR CHINS

In addition to handling children who commit what would be crimes if they were adults, the Children's Court also handles children in need of supervision, or CHINS. These are children who commit acts that would not be considered crimes if they were committed by adults. For example, if a child does not attend school, violates curfew, runs away from home, or

disobeys the reasonable demands of parents, a petition against the child could be filed. Hearing procedures for CHINS are identical to those for children charged with delinquent acts. If the court finds that a child is in need of supervision, the child may be put on probation or sent to a licensed foster home, group home, or residential treatment center. A CHINS cannot be held in a detention facility unless he or she had failed to appear in court or has twice violated probation. In either of these cases, a CHINS can be held up to 10 days and must be physically separated from children who have been found to be delinquent.

As of January, 1982, no detention facility in New Mexico has met this separation standard. Residential facilities for CHINS are limited but exist throughout the state. Among them are Hogares, Inc. in Albuquerque; Belen Boy's Ranch; Villa San Maria at Cedar Crest; Jemez House, north of Espanola; San Felipe in Taos; and group homes in Santa Fe, Clovis, and Farmington.

## NEGLECTED OR ABUSED CHILDREN

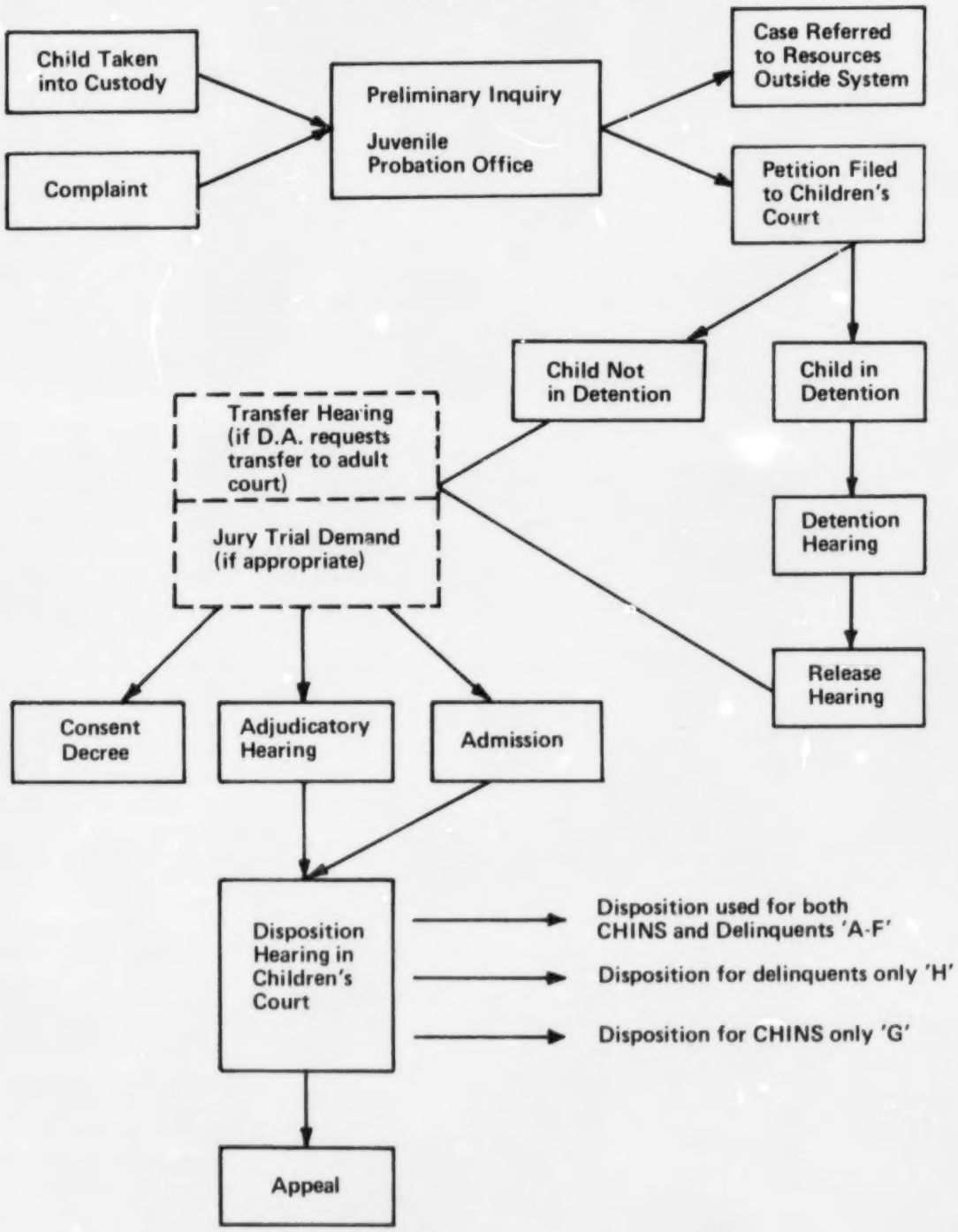
The Children's Court also has jurisdiction over cases involving child abuse and neglect. These cases usually involve younger children who have been abandoned, neglected, or mistreated by their parents. In these cases, there are three different attorneys involved. There is an attorney for the state, called the Children's Court attorney; an attorney for the parents, who are in this proceeding called the *respondents* ; and an attorney for the children, know as a *guardian ad litem.* The guardian ad litem is appointed to represent the best interests of the child and his or her recommendations to the court are usually given a great deal of consideration. If a child is found to be neglected, the Children's Court may allow the child to live with the parents under certain conditions, or the court may place the child with a social service agency, a relative, or in some other type of placement. The Department of Human Services plays an important role in making recommendations to the court regarding what action should be taken and in supervising neglected or abused children and their parents.

## RECENT DEVELOPMENTS IN JUVENILE LAW IN NEW MEXICO

In June of 1981, a new Children's Code enacted by the State Legislature of New Mexico became law. This new version of the Children's Code changed many of the provisions of the former Children's Code.

Important changes were made regarding statements and confessions made by children during questioning. Statements by children over the age of 15 can now be introduced at an adjudicatory hearing if the court determines that the child knowingly, intelligently, and voluntarily gave up his or her rights to remain silent. Statements made by children under the age of 15 still cannot be introduced as evidence against the child at the hearing. Another significant change is that children over the age of 13 can now be photographed and fingerprinted without a court order. Finally, adjudicatory hearings for children charged with delinquent acts are now open to the public. CHINS hearings and neglect hearings are still closed.

## PROCEDURES FOR JUVENILES UNDER THE NEW MEXICO CHILDREN'S CODE




A. Release to parents under conditions defined by court.
B. Placement with relative or in a foster home.
C. Release during good behavior.
D. Placement in a mental institution.
E. Placement in home for the mentally retarded.
F. Placement under the supervision of a probation officer ("deferred action").
G. (CHINS only) Transfer of custody to a child placement agency.
H. (Delinquents only) Transfer of custody to Department of Corrections for treatment in: New Mexico Boys' School at Springer or New Mexico Girls' School in Albuquerque or Youth Diagnostic Center.

# Chapter 4

# Consumer Law

Consumer law regulates the buying and selling of almost everything that we need in day-to-day life. When you and your family purchase such items as food, clothing, transportation, furniture, housing, and items for recreation, you are consumers. Even borrowing money to buy these commodities is a consumer activity.

The law relating to consumers has changed in the recent past. The purpose of the changes is to allow us to be better informed, more thoughtful consumers. The law attempts to provide more information to people who are buying products. It offers protection to those of us who buy products that are unsatisfactory. Nevertheless, the best protection is to make yourself aware of the qualities of the product that you are buying, and your rights, obligations, and conditions of a contract you might be about to sign before you sign.

## CONTRACTS

A contract is a legally binding agreement or promise to exchange something you have for something another person or company has. In most cases, this means that you agree to buy or sell goods or services for cash. A contract, however, can also involve a trade. When you purchase a stereo, or get your car repaired, or rent an apartment, you are entering into a contract.

**Minors and Contracts**
In New Mexico, the law protects persons under 18 years of age (minors) as they are often targets for deceptive sellers. Minors are allowed to contract for goods that are necessities of life, such as food, housing, and transportation, and the minors are responsible for paying these contracts. Any other contracts that are entered into, however, may be voided by minors; that is, minors may back out of contracts. This does not mean, however, that minors will be able to get something for nothing. The law will require minors to return whatever goods were obtained under the cancelled contract.

**Written and Oral Contracts**
Most contracts may be either written or oral. Although you cannot make a verbal agreement on the purchase of goods costing over $500, most contracts made by word-of-mouth are valid. Establishing the specific elements of an oral contract in court, however, is often difficult. You are better off to have all contracts in writing, particularly the terms of repayment. And if a claim by the seller that the product will do something is very important in your decision to buy that product, make sure that the seller writes in the contract that the product will do what the seller claims.

**Contracts Unenforceable in Court**
Some contracts are so unfair and one-sided in the matter in which they are made that the law will not enforce them. These contracts are called *unconscionable.* When, for example, the seller misrepresents to the client the quality of the product and the client is unable to read the contract, the law finds that such a contract is unconscionable. Nevertheless, the fact that a consumer pays a much higher price than the normal value of the product is not enough by itself to make the contract unconscionable.

Also the courts will look to the terms of the contract to make sure that those terms comply with state law. Many of the state laws that control what the terms of a contract may be also contain a provision that an intentional violation of those laws carries a criminal penalty. In the case of *White v. Singleton,* the New Mexico Supreme Court held that when a seller made a contract with a consumer in which an important part of the contract was illegal, that contract was void. It is important to note that the illegal part of the contract must be one of the important terms of the contract. The court will not allow the consumer to

get something for nothing, or be unjustly enriched.

**Warranties**
By law there are two types of warranties, *express* and *implied.* Whenever a seller states a fact about a product, describes certain features of a product, or uses a model or sample, then the seller has given an express warranty. The warranty is a guarantee that the product will have substantially the same features described or be like the model or example shown. While warranties can be very complex, they can be as simple as a statement that a product is good to do a certain thing. While express warranties can be enforced when they are oral, you can prove the existence of these warranties easier when they are in writing.

The law also implies certain warranties. In an implied warranty, a seller need not make any statement for these warranties to exist since they are created by law. For example, a seller need not state that an automobile he or she has sold will actually run since the law creates an implied warranty that the car will be acceptable for its normal use. If the car does not run, the seller has breached the implied warranty.

In New Mexico, even if the seller does not intentionally misrepresent an item as being in good condition when it is defective, the consumer can be protected if the courts determine that the seller was negligent in not knowing that the item was defective. This principle of law is called *negligent misrepresentation* and was adopted in the New Mexico case *Maxie v. Quintana.* This principle of law also appears in the Uniform Commercial Code adopted by New Mexico in 1954.

One thing to be very careful about is that many times sellers will *disclaim* all warranties in a written contract. The seller may do away with these warranties, both the express warranties given during the sales pitch and the implied warranties provided by law. If a contract states that the product is being sold "as is" or "with all faults" or some similar language, the seller is telling you that he or she is not willing to stand by this product and that you are taking all the risks. Nevertheless, a written warranty will take precedence over disclaimers.

## CREDIT

Credit means buying goods or services now or borrowing money now in exchange for a promise to pay in the future.

**Interest Rates**
Until 1981, New Mexico had laws that set ceilings for the amount of interest that could be charged for different transactions involving credit. But in 1981, the New Mexico Legislature suspended interest rate ceilings on all credit transactions until July, 1983. The only interest rate limit still in effect is for pawn. The interest rate ceiling for pawn is 4% per month.

Even though there are no interest rate limits, interest rates still vary depending on the type of transaction. For example, the interest rate charged for the purchase of a new car might be different than for a used car. If you borrow cash on a credit card, the interest rate might be different than if you make a purchase with the credit card. If you buy something on the installment plan, the interest charged might be different than if you borrowed money from a bank to purchase it.

Different lenders might express their interest charges in different ways. Many will tell borrowers what the monthly interest rate charge is. For example, a credit card loan might charge 1½% interest per month on a balance of under $500. Regardless of how lenders express an interest rate, they are obligated by the federal Truth in Lending Act to give the total interest rate in a figure called the *annual percentage rate.* For example, the annual percentage rate on a loan with a monthly interest rate of 1½% is 18%.

SORRY, I JUST SOLD THE LAST ONE. BUT, I DO HAVE AN EVEN BETTER CALCULATOR ON SALE TOO.
ELECTRONICS CITY
Sale CALCULATOR $9.99
SALE
ACE CALCULATOR
Reg. $23.99
Now Only $19.99

This federal regulation allows people who use credit to compare interest rates of different lenders. When you compare credit plans, look at not only the annual percentage rate or interest rate, but also look at the number of payments due, the price of the goods or the loan amount, the finance charge or interest, the total amount due (price or loan amount plus finance charge), and the amount of each payment. Should you find that you are being overcharged for the interest rate, you might be able to have the contract declared void under the New Mexico decision of *White v. Singleton*, which was discussed under the section on contracts.

**Obtaining Credit**

Both the Federal Equal Credit Opportunity Act and the New Mexico Human Rights Act prohibit credit discrimination based on sex, marital status, race, religion, national origins, age, and receipt of public assistance.

Because New Mexico is a community property state (see Chapter 5) all income in a marriage belongs to both spouses equally. If the household qualifies for credit, a credit grantor cannot refuse to grant a wife the same credit in her name that would be granted the husband. If a credit grantor says to homemakers or unemployed spouses that they cannot have credit but their spouses can, the grantors are in violation of the law.

According to the Federal Fair Credit Reporting Act, the credit grantor must tell you which credit bureau prepared your credit report if you are denied credit. You can then contact the credit bureau and see your file free of charge if you do so within 30 days of being refused credit. You can have any disputed information reinvestigated by the credit bureau. If the bureau cannot verify the information, it must be removed from your file. If you believe you have been discriminated against, you can contact the New Mexico Human Rights Commission in Santa Fe. Women can also seek help from the New Mexico Commission on the Status of Women in Albuquerque.

## DEFAULT AND REPOSSESSION

In New Mexico, the seller who has sold an item to you under a credit agreement has the right to *repossess*, which means the seller can take the item back if you fail to live up to your agreement. Should the seller repossess the item, you are no longer under any obligation to pay any of the debts owed the seller on that item, even if the seller resells the item for less money than you still owed. Should the seller resell the item for more money that what you owed, the seller must pay the excess to you after deducting the reasonable costs of the sale. Since the seller's expenses include court costs and lawyer fees, you most likely will not be receiving any excess payment.

Repossession can be voluntary. If you and the seller reach an agreement that you are no longer able to fulfill your part of the contract, the seller will take the item back. If this agreement cannot be reached, the seller may exercise his or her right to get a court order that allows him or her to repossess the item.

The seller may also attempt to have a court order issued that allows the seller to seize the property immediately and to hold the item until a court decision is reached, whether or not you have a valid defense to the lawsuit.

Prior to any court action, each seller has the right to collect the amount you owe on the item. The seller will not try to collect the debt from you until you miss a payment. So long as the seller does not try to collect from you by harrassment or by unfair and deceptive means, the seller may make such contacts as are necessary to collect the debt. If, however, the seller uses unfair or deceptive tactics to collect, you are protected by the New Mexico Unfair Trade Practices Act.

A seller may also collect a debt after you default by *garnishment*. In this case, the seller goes to court to ask for a court order that directs your employer to garnish, or withhold, a certain amount of money from your paycheck each payday until the debt is paid. The seller may obtain up to 25% of your paycheck but may not leave you with less than you would have received had you been making minimum wage.

Garnishment may also apply to other property such as bank accounts. Social Security checks, veteran's checks, civil service pensions, and income from any public assistance program cannot be garnished.

## DECEPTIVE SALES PRACTICES

The New Mexico Unfair Trade Practices Act protects consumers from sellers of goods and services who use deceptive sales tactics. This act is enforced by the Attorney General's office, Consumer Protection Division. When the division sues on behalf of a group of consumers, the Attorney General's office can request a court order that stops the seller from continuing the deceptive sales tactics; the Attorney General can also request an award of money to reimburse those persons who have been damaged by the seller's actions. Under a fairly recent amendment to the Act, consumers themselves may also sue a seller to recover their own damages and to obtain an order telling the seller to cease his or her acts.

The Unfair Trade Practices Act applies to a wide range of situations; the Act prohibits deceptive practices in the selling stage and the collection stage of a transaction as well as all the stages in between. The Act applies not only to the sale of items or products but also to the sale of services, such as car and house repairs.

An example of a deceptive sales practice is when a seller offers goods for sale while intending to not supply a reasonable number of those goods for sale. A seller might advertise a particular special at a very good discount price. But sometimes, the seller has a very limited quantity of those items available and hopes only to induce consumers to come to the store so that the seller may then make sales on other, more expensive items. This sales technique, called "Bait and Switch," is specifically prohibited by the Unfair Trade Practices Act.

Another common deceptive practice is when sales persons misrepresent their intent when they offer "free" home demonstrations. This foot-in-the-door, high pressure sales tactic is also specifically prohibited by the New Mexico Unfair Trade Practices Act, which states that no one may make false statements for the purpose of obtaining appointments for demonstrations or other sales presentations of goods.

The New Mexico Unfair Trade Practices Act also makes it a violation of state law and an unfair trade practice for any automobile dealer to intentionally misrepresent the condition and age of a motor vehicle by, for example, resetting the odometer.

Another deceptive practice has been used by some merchants who make a series of sales to a consumer. Merchants might consider none of the goods purchased from them to paid completely until all of the goods purchased from them to be paid for in full. Suppose you bought a refrigerator in one year, and while still paying for it, later bought other items from the same seller. If at some point you failed to make payment, the seller might consider all of the items, including the refrigerator, under one contract and therefore unpaid for. The New Mexico Retail Installment Sales Act prohibits such an accounting and allows the consumer to pay off the original item completely prior to the completion of the contracts on subsequent purchases.

## CONSUMER REDRESS

### Public Agencies

The state of New Mexico has agencies that issue licenses to certify that individuals offering services or products to the public are qualified to do so. These agencies are also responsible for checking up on whether those individuals are complying with the law after they have been given a license. Some of those state agencies are the Construction Industries Division, the Financial Institutions Division, the Insurance Commission, and the Public Service Commission. If you are unsure which division of state government you should call to complain or get information about a person who is trying to sell you goods or offer you services, you can start with the Governor's Service Center in your local area.

The State Attorney General's office has also set up a special Consumer Protection Division. This division represents the citizens of the state who have problems with particular merchants. The Attorney General's office will investigate complaints and often assist the consumer in settling differences with the merchant. The Consumer Protection Division can also file suit against a merchant who is carrying out an unfair practice to recover money on behalf of all the consumers who have been hurt by the practice.
In Bernalillo County, the district attorney also has a Consumer Protection Branch of his office. This Branch is much like the Attorney General's office except that it concentrates on settling informally the differences between the consumer and the merchant. In very extreme cases, where fraud and criminal activity are involved, this division will refer the case to the district attorney's prosecutors to file criminal charges against any seller who has committed criminal fraud.

Each city and county has the authority to license businesses. Since businesses must obtain a license to sell to the public in the community in which they operate, city and county governments are good sources of information.

**Private Agencies**
Most private agencies that assist consumers are established by businesses who are interested in resolving complaints and keeping their customers satisfied. Examples of some such agencies are the Better Business Bureau and the Chamber of Commerce. The New Mexico Automobile Dealer's Association has recently instituted a program called AUTOCAP, in which a consumer can present complaints concerning a new car to a panel made of automobile dealers and consumers. After hearing both sides, the panel will tell the dealer what actions they feel should be taken to rectify the situation. The automobile dealers have agreed to be bound by the panel's decision. Consumers are free to seek other solutions if they are dissatisfied with the decision.

**News Media**
The news media, as part of their public service broadcasting commitment, assist the public through special programs that investigate consumer complaints. TV 7's "On Your Behalf" is a good example.

**Magistrate and Metropolitan Courts**
A New Mexico consumer who has a complaint involving less than $2,000 can file a complaint against the merchant with the Clerk of the Magistrate Court of that county. Every county, with the exception of Bernalillo County, has a magistrate court. Bernalillo County has the Metropolitan Court in which any complaint involving $5,000 or less may be filed.

You do not have to have a lawyer in these courts. The process was designed to allow people to have their disputes settled in a court when the cost of a lawyer is too high compared to the amount involved. This does not mean, however, that you cannot have a lawyer in these courts.

A consumer who goes into court with a complaint against a merchant usually will be asking the court to award money (damages) from the merchant to compensate the consumer for the loss that was caused by the merchant's faulty product or service. When the actions of the merchant are intentionally deceiving, they can be considered fraudulent; the consumer may then also request the court to award *punitive* damages. The court will award punitive damages to punish the seller for misconduct.

# Chapter 5

# Family Law

## MARRIAGE

**Formal Marriage**
A marriage in New Mexico must meet the following requirements to be legally valid:

(1) Both persons must consent to the marriage. It is considered a contract under law.

(2) Both persons must be 18 years old. If a person is 16 or 17, he or she must have parental permission. If one or both persons is under 16, permission from a district court is required.

(3) Both persons must be unmarried. *Bigamy* is a fourth degree felony in New Mexico.

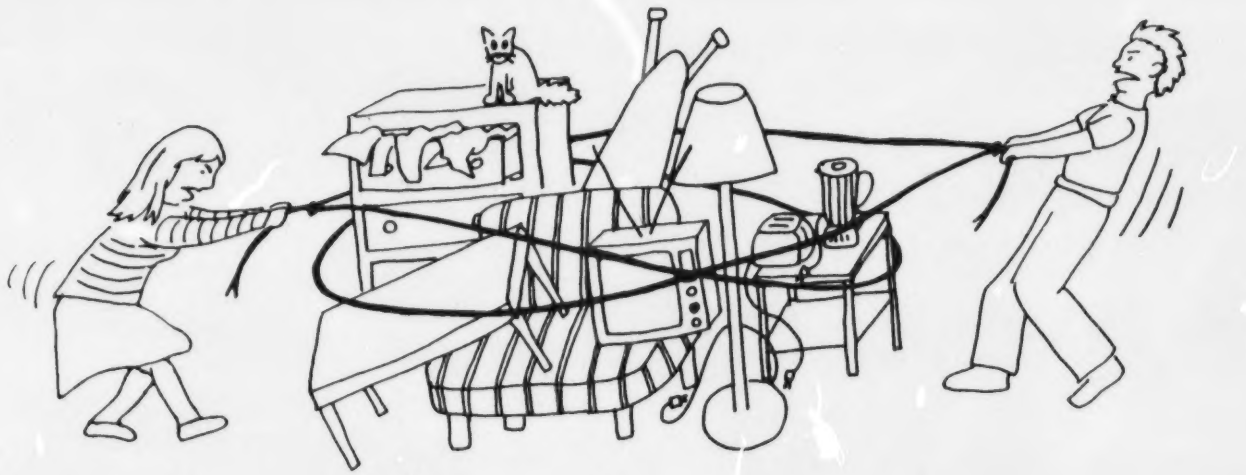
(4) A person cannot marry his or her parent, child, grandparent, grandchild, half or full sibling, aunt, uncle, nephew, or niece. Such marriages are considered *incestuous.* Incest is a third degree felony in New Mexico.

To get married, a license is required. Licenses can be obtained for $5.00 at the county clerk's office. A blood test certificate from a doctor or clinic indicating that each person is free from veneral disease along with proof of age must be presented to the county clerk. The certificates must be issued within 30 days of application for the license. The certificate requirements can be waived by a district or probate court judge if a blood test is against a person's religion or if it is determined that no public health risk exists. The license must be presented to the person performing the marriage ceremony. A member of the clergy of any religion or a judge, including magistrate judges, must perform the marriage. The person performing the ceremony must certify the marriage with the county clerk's office within 90 days. The clerk records the marriage in the county record.

If a couple gets married in a different state or nation, and the marriage meets all the requirements for marriage there, New Mexico will accept that marriage as legally valid. This means that if some of the conditions for marriage where the couple was married would be insufficient or illegal to make a valid marriage here, New Mexico will still recognize that marriage.

**Common Law Marriage**
A common law marriage is a relationship in which a man and woman live together, present themselves to the public as legally married spouses, and have the same rights and obligations as couples who have had formal marriage ceremonies.

In New Mexico, living together is not illegal but pretending to



be married while living together is considered unlawful cohabitation. Common law marriages have never been recognized in New Mexico because New Mexico's law has its roots in Spanish civil law. Spanish law contained a rule that made common law marriages illegal. When New Mexico made the transition from Spanish law to statute law, the Legislature never provided for legal common law marriage. Nevertheless, common law marriages made in states in which they are legally valid are recognized in New Mexico if those couples move to this state.

## ENDING MARRIAGE

### Ending Void and Voidable Marriages

In order to end an *incestuous* marriage, a district court must issue a *decree of annulment* after the court hears the issues of the case. The married couple or the district attorney may go to court seeking an annulment decree. The court does not automatically hear the case.

In marriages involving minors, one or both spouses or their parents or guardians may seek annulment decrees.

Persons married to more than one person, or *bigamists*, create problems in the law, too. Sometimes this happens by accident when a person marries after getting a divorce that was not legally completed. The courts look at the facts of the situation in order to determine which relationship should be protected under the law as the official marriage. In situations like this, courts usually rule that a particular relationship does not meet the requirements to be a marriage in New Mexico.

### Divorce

A valid marriage can be ended when the conditions necessary for a workable relationship have broken down. A district court may grant a divorce if either spouse requests the court to do so, whether or not the other person objects. Such a request, or petition, must state one or more of the following reasons: incompatibility; cruel and inhuman treatment; adultery; or abandonment. *Incompatability*, a common reason for divorce, means that the couple cannot get along and there is no hope of resolving the conflict.

The only requirement for filing a petition for divorce is that one or both partners must have lived in New Mexico for six months before the date of filing, and intend to stay in the state indefinitely.

### Separation

Divorce is not the only option. For religious or other reasons, people might want to avoid divorce. If a couple is permanently separated, either spouse may petition the court for a *separation decree.* Issues of child support and custody, alimony, and property division can be settled in the separation decree.

### Child Custody

Spouses are free to agree on the custody of their children before going to court. If they cannot agree, the court must decide which parent will have the custody of children after divorce or legal separation. It considers a number of factors, including the parents' wishes, the child's expressed preferences, family circumstances, health problems, and other factors that affect the child's welfare. The court tries to base its decision on the best interests of the child. If the child is 14 years of age or older, the court gives special consideration to the child's wishes.

Recently, some courts have been granting joint custody, in which children live with each parent at different times of the month or year. Because of the state Equal Rights Amendment, child custody decisions are becoming more equitable. Although the courts must treat both spouses equally, young children are most often put into the custody of their mother.

### Alimony

In New Mexico, alimony can be

awarded to either spouse, although it is not often awarded. The court decides to whom, and how much is to be paid. Decisions are based on the earning capacity, financial circumstances, need, and accustomed standard of living of both spouses. The court can change or suspend alimony payments if the circumstances of either spouse change. Alimony must be reported as income.

**Child Support**
The court may require the parent who does not have custody of the children to pay child support. The amount of the payments is based on the financial resources of the paying parent and the needs of the children. A recent New Mexico Supreme Court decision provides that the level of child support can be changed if it can be shown that the financial situation of the paying parent has changed. In general, the court orders a fixed monthly payment be made until the child turns 18.

If the paying parent fails to send support payments, the New Mexico Human Services Department can help. It has established a Child Support Enforcement Bureau in Santa Fe which will do the necessary legal work to enforce support orders. This service costs $20 for the application fee.

**Property Division**
New Mexico is a *community property* state. This means that most property acquired during a marriage, including earnings and purchases made with those earnings, belongs to both spouses equally. Property that is acquired by either spouse before marriage is considered *separate property*. Gifts and inheritance are also separate property.

In a divorce, spouses are free to agree on any division of their community property. Their agreement will then be written into the divorce decree. If the couple cannot agree, they will go to court, and the court will divide their community property. The court will attempt to seek the fairest arrangement on the division of property. The court may order specific uses of the community or separate property to protect both spouses and children. For example, the court may order the use of community or separate property to pay alimony or child support.

## RIGHTS AND DUTIES OF PARENTS AND CHILDREN

**Basic Rules**
The marriage contract obligates each spouse equally to respect and support the other spouse in all ways, including financial support, so far as possible. Under the law, parents must also support each child until the age of majority, which is 18 in New Mexico. The parents, as individuals and together, are obliged to provide all the necessities of life for each child. Parental rights and obligations involving the welfare of a child may be terminated only by death or court decree.

A child born out of wedlock automatically has the rights of support and inheritance from the mother. The child also has these rights from the father if the father has recognized the child as his or if paternity has been established in court. The mother or the State of New Mexico can go to court to establish the paternity of the father or to enforce the father's duty to support the child. The court will determine the amount of support to be paid.

Stepchildren retain the rights of support and inheritance from their natural parents. Step-parents are not obligated to support stepchildren.

Parents are responsible for sending their minor children to school until (1) graduation from high school; (2) age of majority is reached (18 years old in New Mexico); or (3) special permission from parents and school officials is obtained to leave school.

Some children, called *emancipated minors*, are legally free of their parents' authority. Married minors 16 years or older and minors on active duty in the armed forces fall into this category. A minor who has willingly left home and is supporting himself or herself may also petition the court for a declaration of emancipation under the New Mexico Emancipation of Minors Act. The court may grant the petition for any or all of the following purposes: termination of parental authority and support; the right to make contracts; the right to sue or be sued; termination of parental liability; the right to establish a residence apart from parents; termination of parents' right to the minor's earnings; the right to medical care without parental consent.

Runaways are not automatically emancipated minors. Parental authority cannot be avoided simply by leaving home against the parents' wishes. Nevertheless, if a minor child is continuously unmanageable or involved in criminal activity, truancy, or runaway problems, the child will probably be referred to the Children's Court. (See Chapter 3)

**Property and Debts**
Both spouses have an equal right to manage and control their community property, including personal property and real

estate; both spouses must sign any transaction involving real estate. Nevertheless, if only one spouse's name appears on a legal document, such as a bank account or car title, he or she alone has the right of control.

Each spouse is usually responsible for the other's debts if those debts were acquired during the marriage. These are considered *community debts.* Community property can be used to pay community debts. If a spouse acquires a *separate debt* before or after a marriage, only his or her half of the community property may be used to pay those debts.

**Injuries Within Families**
New Mexico is different from many states because it allows spouses to sue one another for damages from injuries resulting from household violence. Lawfully married minors may also sue spouses if they are injured. Spouses may also be prosecuted on criminal charges of assault and battery. Nevertheless, a wife cannot file a complaint of sexual assault against her husband if she is living with him and has not filed for a separation or divorce.

In cases of child abuse or neglect, criminal charges can be filed against parents. People in special contact with children, such as teachers and doctors, are obligated to report any indications of child abuse either to the district attorney's office or the Department of Human Services.

**Family Planning, Birth Control, and Abortion**
Under New Mexico's Family Planning Act, passed in 1973, comprehensive family planning services, including contraceptives and other medical help are available to any individual or family who wants them. The New Mexico Human Services Department, Planned Parenthood, family physicians, and local health departments can provide information and prescribe or recommend birth control methods. There is no requirement that a woman be married or have the consent of her husband or parents to obtain contraceptives. The law does not state an age requirement, but some doctors require parental consent for minors.

In 1973, the New Mexico statute restricting abortions was declared unconstitutional in the case of *State of New Mexico v. Shance* shortly after the United States Supreme Court decision on abortion was delivered. Any woman in the state can now get an abortion during the first six months of pregnancy if state or federal funds are not used. A woman may be refused in the last three months unless an abortion is necessary to protect her life or health. Permission from husbands or parents is not required.

State and federal funds for abortions can only be used if (1) the life of the mother is endangered by the pregnancy; (2) the pregnancy would cause long-term and severe damage to the mother's health; or (3) the pregnancy is the result of rape or incest (as long as the rape is reported within 10 days and the incest within 60 days).

**Government Support for Needy Families and Others**
The New Mexico Human Services Department has the responsibility for providing needy families and individuals with various forms of assistance. The department gets its funds from the state and federal governments. It decides who qualifies for public aid and how much aid will be given. The department administers Aid to Families with Dependent Children, General Assistance, and Food Stamp programs. For information on eligibility and benefits, contact the Human Services Department in your area.

## FOSTER CARE AND ADOPTION

Custody of children may be taken from parents and transferred to the state, either on a temporary or permanent basis. This may be done voluntarily by parents if they cannot provide a proper and safe environment for the child or if the child is put up for adoption. The court may also order a transfer of custody to the state in cases of child abuse, neglect, or abandonment. When custody is transferred, the state assumes parental rights and duties. The Social Services Division of the Human Services Department provides welfare services for these children and places them in foster homes, group homes, or institutions.

In order for a child to be adopted, the natural parents must give their consent. If the court, finds, however, that a child has been abandoned, abused, or neglected, the court may terminate the rights of the natural parents. In this case, the parents' consent is not required. When a child is adopted, there is a six month waiting period before the adoption is legally granted. If the natural parents want to regain custody of the child, they have one year from the time the adoption is granted to bring their case into court.

Once a child is adopted, the child has the same rights of support and inheritance as natural children; adoptive parents have the same rights and obligations toward the child as natural parents.

The Social Services Division of

the Human Services Department is the state agency that handles adoptions. There are three other licensed agencies in the state: the New Mexico Christian Children's Home in Portales; the Chaparral Home and Adoption Agency in Albuquerque; and Catholic Social Services in Santa Fe.

## WILLS AND INHERITANCE

In New Mexico, any person who has reached the age of 18 years and is of sound mind may make a will. The will must be in writing and signed by the author of the will, known as the *testator*, or by a person acting at the direction of the testator in the testator's presence. Two or more witnesses must also sign the will. The witnesses must be present when the testator or the person acting for the testator signs the will. The witnesses must also be present to witness each other's signatures. New Mexico allows persons who are interested parties to the will (that is, persons who are named to inherit or take responsibilities under the will) to act as witnesses to the signing of the will.

Under New Mexico law, when a spouse writes a will, that spouse has a right to give away his or her share of the community property from the marriage and all of his or her separate property. This property does not have to be left to the surviving spouse and children.

Nevertheless, a person must specify in the will or other legal documents that the surviving spouse and children have been intentionally left out of the will or have been provided for by other means. If this is not done, the spouse and children may take a share of the property under the rules of inheritance in New Mexico. These rules also apply if a person dies without making a will.

Under these rules, if the deceased spouse has no children, the surviving spouse inherits all the deceased spouse's separate property. If the deceased spouse has children, the children divide 3/4 of the separate property and the surviving spouse takes 1/4. The surviving spouse is also entitled to the deceased spouse's share of their community property.

# Chapter 6

# Housing Law

## RENTING A HOME

No matter what type of residence you rent, whether it be an apartment, a house, or a mobile home, your residency is covered by a state law called the Owner-Resident Relations Act. This Act spells out the rights and duties of both the landlord and the tenant. The following sections explain some of the important provisions of the Act.

**Rental Agreements**
In New Mexico, you rent a residence either through a lease or an oral agreement. A lease is a contract – a written agreement between two parties. A lease spells out the length of your tenancy, the amount of the rent and the security deposit to be paid, and the other rules of the building. Under the Act, however, an oral agreement between a landlord and a tenant can also be a rental agreement.

In New Mexico, most tenancies are on a month-to-month basis. That means your lease does not spell out the length of your tenancy. It means you pay your rent each month on a specified day. Your tenancy continues until you decide to move or until your landlord asks you to move.

If you have a month-to-month agreement, that means you must give your landlord a written notice thirty days in advance of your moving day. And if the landlord asks you to move or wants to raise your rent, he must write you thirty days in advance.

**Security Deposit**
A security deposit is a reasonable amount of money that a landlord may ask from a tenant in addition to rent. The landlord applies the security deposit toward any damages you may cause to the place you have rented. While this deposit is not considered pre-paid rent, a landlord may apply the security deposit toward the payment of any back rent you may owe when you move out.

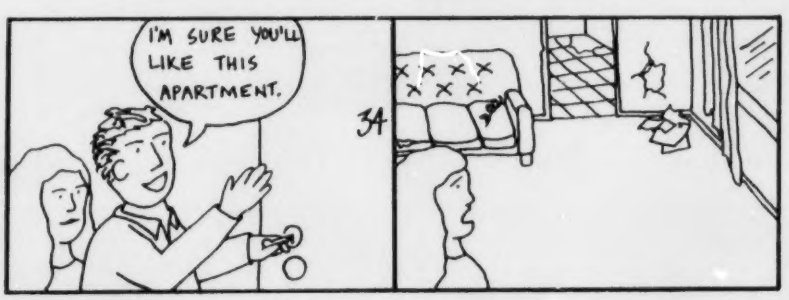
A landlord cannot charge more than one month's rent as a security deposit on an oral or written lease that is less than one year. If there is a written lease for more than one year, the landlord can charge any amount. If the landlord charges more than one month's rent on a lease of one year or longer, the landlord must pay the current passbook interest rate on the amount of the deposit to the tenant.

If you leave the place in the same condition as when you moved in, the landlord must give you back your security deposit. If you damaged the place, the landlord may deduct repairs from your deposit, but he must give you a written list of deductions within thirty days after you move out.

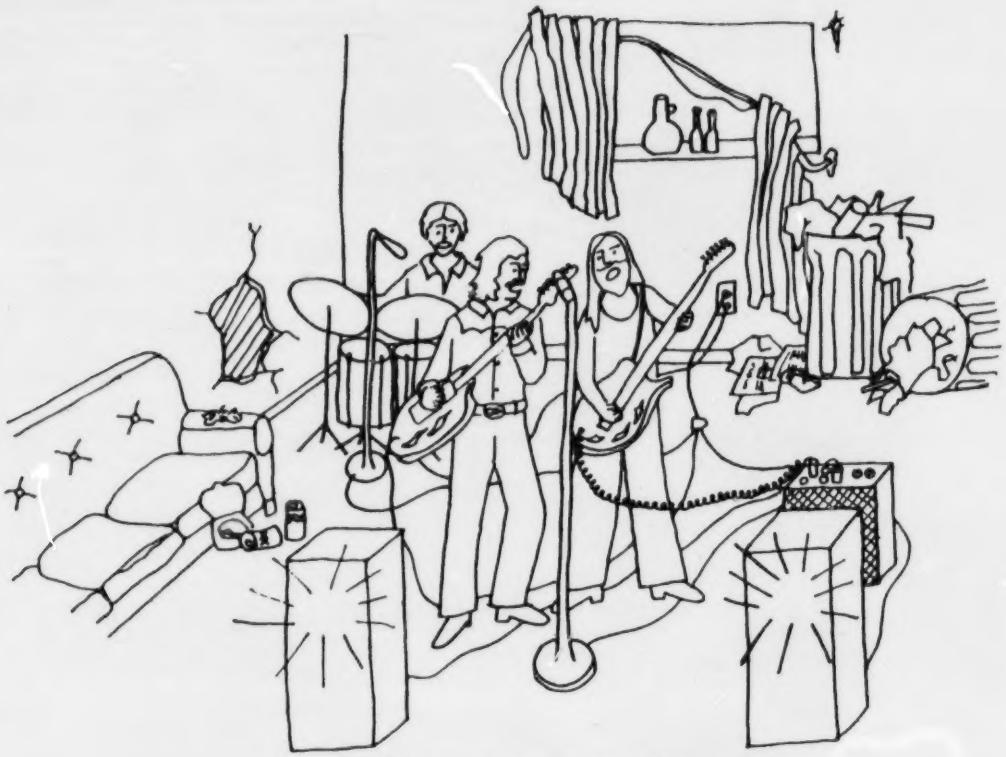
If the landlord does not give you back your security deposit or a written list of deductions from the deposit, you should demand that he do so in writing. (See model letter) If he fails to comply with your request, you may take him to court.

**Duties of the Landlord**
You have the right to a safe and liveable apartment or house for the rent you pay.

The landlord must maintain in good, safe working order the plumbing, heating, ventilation, air conditioning, and electricity. The landlord must also provide garbage cans and arrange for garbage removal.




**What should the prospective tenant do now?**



**How has the tenant violated his obligations?**

You are also entitled to running water and a reasonable amount of hot water and heat unless the heat is under your exclusive control.

The landlord must also make repairs and put and keep the premises in safe condition; for example, you are entitled to safe stairways and railings.

If the landlord fails to keep up his end of the rental agreement, then he has *breached* that agreement. You may then move out by ending the rental agreement in writing. Your letter to the landlord must state the breach. Or, you can stop paying rent. Before deciding to withhold rent, however, you should talk to a lawyer.

**Landlord Access**

With your permission, your landlord may come into your apartment or house for several reasons: to inspect the premises, to make necessary repairs, to decorate, to make alterations or improvements, and to show the premises to workers, potential buyers, or potential tenants.

The landlord must exercise this right in a reasonable manner. He may not harrass you with repeated visits or visits at an unreasonable hour.

Depending on your agreement, your landlord might also have the right to enter your residence without your permission. Your rental agreement might require you to inform your landlord when you will not be home for seven days or longer. If this is the case and you do not notify your landlord that you will be gone, he will be able to assume that you have abandoned your home. The landlord may then enter the apartment or house to remove and store your belongings.

**Duties of the Tenant**

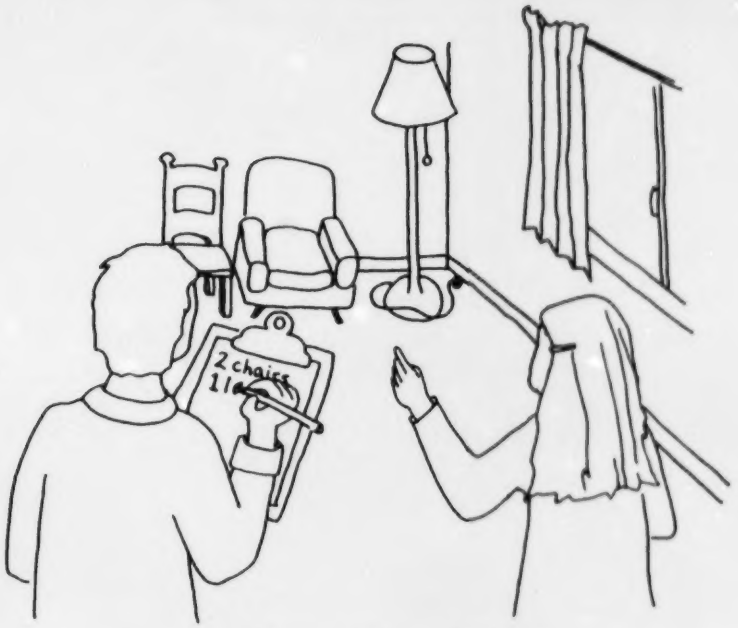
The landlord has the right to expect you to keep your rental agreement, whether the agreement is written or spoken.

For example, you must pay your rent on time. You must get rid of your garbage in the way arranged for you. If the agreement you signed says "No Pets," your landlord has the right to expect that you will not have pets.

If your landlord makes a rule or changes one, you must be given a written copy when you make the rental agreement. These rules must be reasonable, apply to all residents fairly, and be clear enough that you know what you must and must not do.

You must fix anything you break, although you are not responsible for normal wear and tear. You must use the apartment or house you have rented as a place to live and sleep unless you and the landlord have made other arrangements. In addition, you must not disturb the peace and quiet of your neighbors.

If you do not keep up your side of the rental agreement, then you have *breached* that agreement. Your landlord then has the right to ask you to move or sue you if you do not move.




**Are these wise tenants? Why?**

**Upkeep and Repairs**
If you cause damage such as breaking a window in your place, you are responsible for fixing it. If you did not cause the damage, then your landlord is probably responsible for fixing it.

The best time to ask for repairs and improvements is before you move in. Walk through with a friend and ask your landlord to fix those things you both agree are wrong. Before you move in, take a picture of anything wrong, like a broken light fixture, having both you and your friend initialing and dating the photos. These photos and your witness will help you prove you are entitled to your security deposit when you move out.

If the landlord does not fix those things you agreed upon before you moved in, or you discover something that needs repair after you are living there, write your landlord to ask him to see to the repairs. If the apartment has a manager and an owner, the letter should be sent to both. This request must be in writing, and you should keep a copy of any correspondence you have with your landlord. Your letter to the landlord must clearly state the nature of the problem and that the condition is a major departure from your rental agreement. You must also give the landlord at least seven days to make the necessary repairs or to reasonably attempt to make them. Make sure to mail your letter by certified mail or hand-deliver it with a witness so that you have proof that the landlord receives it.

If your landlord refuses or neglects to make the repairs, you may do one of three things:

(1) stop paying rent;

(2) terminate your lease; or

(3) take the landlord to court and force him to do the repairs.

If you intend to stop paying rent, you must indicate this in your letter to the landlord. You should also write to you local housing authority (e.g., the Code Enforcement Division in Albuquerque) that you intend to stop paying rent. If the landlord does not respond or refuses to make the repairs, you may choose to use the rent you withhold to make the repairs yourself. If you do this, keep receipts on all repairs done. You should also get the local housing authority to send inspectors to your home to make an official record of the violations they find. Ask for a copy of their report.

If you choose to end your lease, state law provides two ways to do it. You may tell your landlord in your letter that you will terminate the lease if the landlord does not attempt to make repairs within seven days of receiving the letter. You may then move out. The second way is to inform the landlord that the lease will be terminated in seven days with no chance to for him to make repairs and avoid the termination of the lease. You make take this action only for violations of the housing codes or health and safety regulations, not for a breach of the rental agreement.

**What Tenants Can Do in Court**
You may choose to go to court to force the landlord to make repairs or for breaches in your rental agreement. Landlord-tenant conflicts are handled by Metropolitan Court in Albuquerque and in magistrate court in other jurisdictions. You do not need a lawyer to take your landlord to court, although a lawyer might be helpful if the situation is very complicated. (See Chapter 1 on "Choosing a Lawyer")

The first step is to go to the magistrate or Metropolitan Court clerk, who will give you a complaint form to fill out. There is a $10 filing fee. You will receive four forms: a summons, a copy of the complaint, an answer form, and an affidavit of services. The first three forms must be delivered to your landlord, either by the sheriff or someone that you select , such as a friend. The person who delivers the forms must return

the affidavit of services to the clerk. This shows that the forms have been delivered.

The landlord has seven to 10 days to answer your complaint. A copy of the answer and notice of trial date will be sent to you. You need to prepare for your trial by writing a detailed summary of your problem and collecting all necessary documents such as repair receipts, copies of letters, housing violation reports, photographs, and any other materials that will support your case. If there are witnesses who can help your case, ask them to be present at the trial. Talk to them about what they will say.

At your trial, you as plaintiff will present your case first. Explain your problem, show the judge your supporting documents, and call your witnesses. The landlord will then present his case. The judge (or jury if you choose to have one) will deliver a decision. If you win, the landlord might have to pay your court costs. If you lose, you have the right to appeal.

**What Landlords Can Do in Court**
If you breach the rental agreement, the landlord must deliver written notice to you that tells you how you have breached the rental agreement; for example, you may be having noisy parties or you never take your garbage out. You have seven days to remedy the breach. If you do not, the landlord can terminate the rental agreement.

If you do not pay your rent when it is due, the landlord must give you a written notice that states you have three days to bring your rent current. If you do not, the landlord will terminate the rental agreement.

If you do not remedy the breach of agreement or pay your rent within the time specified, you must move out. If you do not move out, your landlord may sue to evict you.

The court process is the same if your landlord takes you to court. The landlord must give you written notice that he is taking action against you. You will receive a summons to appear in court and an answer form to fill out and bring to court at the time of your trial. The trial must take place within 10 days of your receipt of the summons.

If the landlord wins, you will have to pay court costs and back rent. If you pay, you may continue living at the rental unit. If, however, a tenant receives three or more summons during a year, the tenant may not be allowed to pay back rent to stay on in the rental unit.

If you do not pay the landlord the amount the court determines you owe, the sheriff can go to your home and take personal property to sell towards payment of the amount you owe. New Mexico law prevents certain property from being taken, such as one motor vehicle, furniture, clothing, books, and tools of your trade.

If a landlord sues a tenant, the tenant may *countersue* for any breach of the rental agreement by the landlord in the same action. The tenant follows the same steps as outlined above.

## BUYING A HOME

**Using a Realtor**
When you buy a home, you will probably use a realtor. Realtors have access to the listings of many homes that are for sale. A realtor will show you the homes, and discuss different ways to finance their purchase. The realtor will perform this service at no charge to you because he or she is working for the seller of the house. The realtor receives as payment a percentage of the purchase price of the home from the seller.

When you have found the house that you want to buy, the realtor makes an offer on your behalf to the seller. When signed on a purchase agreement, this offer is a contract when the seller accepts it. Quite often, these purchase agreements are conditional upon the buyer receiving financing for the purchase of the home.

**How to Finance a Home**
Usually when you buy a house,

you cannot afford to pay the whole price without borrowing. In most cases, you will make a cash downpayment to the seller. To pay the remainder, most people take out a *mortgage loan.* A mortgage is a loan in which the title or deed to the home is held by the lender as security.

In some cases, the seller already has a mortgage on the house that can be assumed by the buyer. This means that the buyer takes over the payments that the seller had been making to his or her bank. When those payments have been made, you own the home completely. If you default on your payments, the lender will file a lawsuit with the court to foreclose on the house. In foreclosure, the lender forces a sale of your home to recover its money.

While most people take out a mortgage to buy a home in New Mexico, a home may also be bought through a *real estate contract* between the seller and the buyer. This contract permits the buyer to make a small downpayment and then make monthly payments with an agreed-upon interest rate on the balance of the purchase price to the seller. Payments under this arrangement are deposited either with a bank or with an *escrow company,* which handles payments and documents in real estate transactions.

The escrow agent accepts payments from the buyer and forwards the money to the seller. The escrow agent also holds the real estate contract, the warranty deed, and the special warranty deed. A *warranty deed* is a written document signed by the seller that transfers legal ownership of the house to the buyer. When the buyer makes all of the payments to the seller under the terms of the real estate contract, the escrow agent releases the warranty deed to the buyer.

MODEL LETTER – *ASKING FOR REPAIRS*

Mr. Landlord
100 1st Street
Albuquerque, New Mexico

Tenant's Address
Date:

Dear Landlord:

I live in a rental unit located at _____ (Address). I would like to bring to your attention the following conditions at my residence. (Describe the present situation and list repairs that you feel are needed.)

As required under New Mexico law, this is written notice to you to correct this situation as needed within seven (7) days. If there is no reasonable attempt to do so then I will have to seek further recourse. Yours truly,

MODEL LETTER – *GIVING NOTICE OF TERMINATION*

Mr. Landlord
100 1st Street
Albuquerque, New Mexico

Tenant's Address
Date:

Dear Landlord:

I live in the premises located at _____ (Address). I plan to move out of these premises on _____ (Date of the move). This letter is to provide you with the notice that is required by law. I will return my keys to you on _____ (Date of the move). I expect the return of my damage deposit within thirty (30) days of my moving out as New Mexico law requires. You can forward it to me at the following address: _____ _____. If you want to inspect the apartment before I move out, please notify me so that we may arrange a convenient time for both of us. Yours truly,

MODEL LETTER – *DEMAND LETTER FOR SECURITY DEPOSIT*

Mr. Landlord
100 1st Street
Albuquerque, New Mexico

Tenant's Address
Date:

Dear Landlord:

On _____ (the date of the move), I moved out of the premises that I had rented from you at _____ (address). Please note my forwarding address above.

At that time, my rent was paid up and when I moved out I left the apartment as clean as it was when I moved in. There was no physical damage to the premises beyond normal wear and tear. New Mexico law requires you to return my deposit or to supply me with a written list of repairs within thirty (30) days after the date I moved out. You have failed to do this.

If my deposit is not returned promptly, I will be forced to seek a remedy in court. Yours truly,

If you are a buyer under a *special warranty deed* and you fail to make your payments to the seller, then the seller must notify you of your failure to pay. The seller will give you a period of time, usually 30 days, to bring your payments current. If you do not make your payments within that time, the seller may declare the entire amount of the contract is then due. Or the seller may notify the escrow agent that the contract is terminated. The escrow agent will then release the special warranty deed to the seller, who will then own your house again.

# Chapter 7

# Individual Rights Law

Individual rights and liberties of citizens of New Mexico are guaranteed not only by the United States Constitution and the federal laws, but also by the Constitution and the laws of the State of New Mexico. There are two basic rules that govern the relationship between state and federal authorities. First, Article VII of the United States Constitution states that the federal Constitution, federal laws, and treaties entered into by the United States are the supreme law in the country. This provision means that federal law is superior to state law; state law must not conflict with federal law. If it does, state law must give way to the federal one. Second, the Fourteenth Amendment to the United States Constitution requires that the states must not violate the rights guaranteed to all citizens by the federal Constitution. This rule means that the protections offered by the states must be no less than those guaranteed by the federal Constitution: state constitutional and statutory protections of individual rights may be broader, but not narrower, than federal constitutional protections. Practically speaking, these rules mean that most state protections of individual rights are remarkably similar to federal ones, and New Mexico law is no exception.

Article II of the New Mexico Constitution is the state Bill of Rights. It basically covers the same individual rights and liberties protected by the federal Constitution, and some provisions, such as the Due Process and Equal Protection Clauses, are worded exactly like those clauses of the Fourteenth Amendment to the United States Constitution.

The New Mexico Supreme Court, which has the final authority to interpret New Mexico law, can interpret any provision of the New Mexico Constitution more broadly than the United States Supreme Court might interpret the corresponding federal provision. Almost always, however, the state Supreme Court's interpretations of the state Constitution are identical to federal constitutional law and the state Court commonly relies on United States Supreme Court precedent.

In addition to the State Constitution, the New Mexico Legislature has passed statutes designed to protect the citizens' individual rights. Again, though these statutes are not worded exactly like federal statutes, they are similar in their structure and aims to the federal models.

## FREEDOM OF SPEECH AND ASSOCIATION

The New Mexico Constitution, Article II, Section 17 guarantees freedom of speech and of the press. New Mexico courts have interpreted and applied the guarantee of freedom of speech, under both the federal and state constitutional provisions, in much the same way that the federal courts have interpreted the federal provision. The New Mexico Supreme Court has said, for example, that to close a movie theater on the grounds

BUT YOU'RE VIOLATING OUR RIGHTS TO SPEECH AND ASSEMBLY!
YOU'RE INTERFERING WITH THE FUNCTION OF THE UNIVERSITY ADMINISTRATION!

that an allegedly obscene picture is being shown, might amount to a violation of the federal and state guarantees of freedom of speech.

Though guarantees of freedom of speech limit the state's power to censor speech (the prior restraint doctrine), the state may regulate, within reasonable limits, the "time, place, and manner" of speech and conduct. This is illustrated in the case of *State of New Mexico v. Silva* (1974). Demonstrators at Eastern New Mexico University held a "sit-in" in the state university president's office to protest funding policies for an ethnic studies program. When the demonstrators were asked to leave, they refused and were arrested. They sued on the grounds that their rights of free speech and assembly were being violated. The case reached the New Mexico Court of Appeals, which ruled against the demonstrators. The Court held that the demonstrators' speech was not protected by the Constitution because the demonstration interfered with the functions of the university administration.

Likewise, the state may reasonably regulate conduct protected by the First Amendment guarantee of freedom of association. In 1975, students filed suit against a state university that had a rule prohibiting male and female students from visiting each other's dormitory rooms. The students claimed that the rule violated the First Amendment guarantee of freedom of association. The New Mexico Supreme Court ruled against the students. Such a regulation, said the Court, does "not appreciably interfere" with the communication among students that is so important to the educational process. The Court said that the regulation was justified by the need for students to conform to "generally accepted standards of conduct."

## FREEDOM OF RELIGION

The New Mexico Constitution Article II, Section 11 guarantees freedom of religion, and further provides that no "preference [shall] be given by law to any religious denomination or mode of worship." Again, with regard to the free exercise of religion, the state and federal constitutional provisions are interpreted in much the same way as they are in the freedom of speech and association. For example, in the case of *State of New Mexico v. Brashear* (1979), a New Mexico man was convicted of possession of marijuana. He claimed that according to his religious belief, God gave man herb-bearing seeds to use; and that therefore his use of marijuana was protected by the state and federal guarantees of freedom of religion. The New Mexico Court of Appeals, however, relying primarily on federal cases, held that his use of the drug was not "religious." The evidence showed that the drug was used only to enhance religious experiences, but the use of the drug was not a religious experience itself. The court said this case was different from the cases in other jurisdictions where certain Indian tribes have been allowed the use of the drug peyote in religious ceremonies. Since peyote had for centuries itself been considered sacred by those Indians, and had for centuries been an essential part of "bona fide religious ceremonies," its use was protected by the First Amendment.

Though the federal and state free exercise clauses are interpreted in the same way, this might not be the case for the interpretation of the establishment of religion. The state Constitution forbids only the giving of a preference to any religion, while the federal Constitution forbids an establishment of religion.

Consider the following situation in which a New Mexico law might be in conflict with the Supreme Court's interpretation of the establishment of religion.

In 1980, the United States Supreme Court held that a Kentucky law which provided for the posting of the Ten

Commandments in public school classrooms was unconstitutional. The law clearly was meant to promote the Christian and Jewish religions, and therefore it had the effect of "establishing" those religions. In its 1981 session, the New Mexico Legislature passed a law that allows the posting of the Ten Commandments in public school classrooms, so long as copies of important texts from other religions are also posted.

It may be argued that this new law is intended to promote the comparative study of religions, rather than to promote religion itself. Since the new law does not prefer any religion over another, it complies with Article II, Section 11 of the New Mexico Constitution.

There is an unanswered question, however, whether the new law violates the federal Constitution, which forbids a state from making a "law respecting an establishment of religion." This was interpreted by the United States Supreme Courts in 1947 as meaning that "[neither a state nor the Federal Government] can pass laws which aid one religion, *aid all religions*, or prefer one religion over another (emphasis added)." If the new law is challenged as being unconstitutional, the question may be whether the posting of religious texts is really intended to assist in the study of history or religion, or whether the legislature intended to "aid all religions." This is still a controversy in New Mexico that has not been resolved.

## THE RIGHT TO PRIVACY

The New Mexico Legislature has passed certain laws to protect the individual's right to privacy. For example, the state bureau that collects "vital statistics" (relating to births, marriages, and deaths) may not disclose that information except in limited circumstances. No district attorney may eavesdrop or use "wiretaps" in investigations for the state unless he or she has first obtained a court order based on a showing of a genuine need for the invasion of privacy. Reporters may not be forced to divulge their sources of information. This last provision protects not only the constitutional guarantee of freedom of the press, but also protects the privacy of the individuals who supply information to the press.

The State Board of Education has the responsibility of protecting the privacy rights of students and their parents. According to regulations written by the State Board, every student has a right to inspect his or her academic record, and is entitled to an explanation of anything written on the record that the student does not understand. The student's parents and the faculty and administration may also see the record. In addition, academic records may be released without the student's permission upon request of another learning institution, such as a college to which the student has applied for admission. However, no other person or entity, including the federal and state government or any other local agency, may see the student's record or obtain any information from it without the written consent of the student.

## DUE PROCESS OF LAW

The state due process clause provides that "no person shall be deprived of life, liberty, or property without due process of law." This wording is almost exactly like the federal due process clause. The state provision has also been interpreted in the same way as the federal to mean that when the state seeks to deprive someone of a protected interest, it must do so fairly, and by proper procedures.

A recent case illustrates how due process has been interpreted in New Mexico. There is a state law that prohibits any person from being employed by a school district if a relative of that person sits on the school board. A teacher in southern New Mexico was fired when her father was elected to the local board of education. The teacher sued, claiming her due process rights had been violated. The Court held that the teacher had not been deprived of due process because (1) she was given notice of the termination, (2) a hearing was held prior to her termination, and (3) good cause – the fact that her father was on the school board – was found for the termination. In other words, due process does not guarantee a right to public employment; it only guarantees that such rights may not be taken away by the state unless certain procedures are followed.

The United States Supreme Court, in *Goss v. Lopez*, stated that the right to attend public school is one of the interests protected by the federal due process clause. In New Mexico, the right of citizens to attend a free public school is specifically protected by the New Mexico Constitution in Article XII, Section 1. This means that every public school system must give some sort of notice to the student, and provide some sort of hearing, when the school proposes to suspend or expel a student for disciplinary reasons.

The State Board of Education has published regulations that describe the process which is due in such circumstances. The type of notice and hearing that is provided depends on the seriousness of the disciplinary actions that the school considers taking. If the school proposes to take a student out of school immediately, but only for one day or less, the notice to the student of the charges may be oral, and the hearing only needs to be "rudimentary." Such a hearing may be a short discussion, with some person other than those involved in the incident. It can take place immediately after the incident occurs, and before the student's parents are notified. If the school proposes to suspend the student for ten days or less (but more than one day), the school needs only to provide oral notice to the student,

and may notify the parents later. The hearing that is required in this case, however, is slightly more substantial. The school must explain the charges against the student, and, if the charges are denied, must explain the evidence in support of the charges. In addition, the student must have an opportunity to present his or her own side of the story.

If the school proposes to suspend a student for more than ten days, or to expel him or her permanently, the notice and the hearing requirements are much more stringent.

The notice must meet these six requirements:

(1) Be given to the parents by certified mail at least five days before action is taken against the student;

(2) Contain a copy of the Board of Education regulations;

(3) Describes the charges and the action being considered against the student;

(4) Inform the parents of a hearing to be held within fifteen days of the notice's mailing;

(5) Provide information about the student's rights to present evidence at the hearing; and

(6) Provide information about the student's right to be represented by his or her parents or a lawyer.

The hearing must be before persons not involved in the incident or incidents. At the hearing, the student has a right to:

(1) Respond to the school's evidence;

(2) Produce his or her own evidence;

(3) Confront and cross-examine the school's witnesses;

(4) Be represented by a lawyer; and,

(5) Tape-record the proceedings.

The school must inform the student of the decision within five days of the hearing and must describe the reasons for the decision. All this must be done before the student is expelled or suspended on a long-term basis. If the decision goes against the student, he or she may appeal it to the local school board.

## DISCRIMINATION

**Race and National Origin**

The right to be free from unreasonable classifications is of special importance in New Mexico. If one looked at the federal court cases on discrimination, one would find that a great many of the "landmark" cases have to do with discrimination against black people. This is because on a national level, racial relations between whites and blacks have had tremendous historical importance. In New Mexico, however, the history of black/white relations is only part of the story: this state has a unique, multi-cultural history due to the great importance of two other segments of our society – Indian and Hispanic peoples.

One of the most difficult recent problems regarding Indians concerns so-called "reverse discrimination." The case of *Livingston v. Ewing* (1979) caused considerable controversy in the state. A white man and white woman wanted to sell their handcrafted jewelry in front of the Palace of the Governors in Santa Fe, but a state regulation reserved that selling space exclusively to Indians. The Anglos took their case to court claiming that this racial discrimination violated the Equal Protection Clause of the United States Constitution. The United States Court of Appeals for the Tenth Circuit rejected their claim, and emphasized the important governmental interest in fostering the distinctive Indian arts and community. This case is among a very few federal decisions upholding racial classifications, and demonstrates the unique legal status of Indians.

The rights of Hispanic people are also the subject of a great deal of legal attention in New Mexico. Several state constitutional provisions protect the rights of people who speak Spanish. These provisions guarantee the right to vote, to serve on juries, to read the laws, and to receive an education. Article XII, Section 10 of the New Mexico Constitution states that Hispanic children shall be guaranteed the right to attend public schools, shall never be classed in separate schools, "but shall forever enjoy perfect

equality with other children in all public schools and educational institutions of the state." There are federal and state statutes that allocate funds for bilingual education in New Mexico. On one occasion, the federal courts stepped in to design a bilingual educational program for a New Mexico school district in order to ensure the guarantee of equal educational opportunity.

**Sex**

As has been noted, the equal protection clause of the state Constitution is worded and interpreted almost exactly like the federal equal protection clause. The state Constitution however, contains an even more powerful weapon against sex discrimination that the federal Constitution does not contain. Article II, Section 18 of the New Mexico Constitution states in part that "equality of rights under law shall not be denied on account of the sex of any person." This is the state Equal Rights Amendment, which was added to the Constitution in 1972. The state ERA requires that all laws of this state be written in gender-neutral terms and applied without reference to the sex of a citizen. After the adoption of the ERA, the state Legislature rewrote many New Mexico statutues in order to bring them into compliance with the new constitutional provision. As a result of the New Mexico ERA, it is now illegal to deny women equal access to housing, employment, credit, education, health services, public accommodations, property rights, and social benefits simply because of their sex.

**The Human Rights Act**

In 1969 the New Mexico Legislature passed the Human Rights Act,which was designed to eliminate discrimination in many forms. As of 1969, no employer of four or more persons, nor any public accommodation(hotels, restaurants, theaters, etc.), nor any trade union, nor any seller or lessor of property, nor any bank or any other lending institution may discriminate against any other person because of race, religion, color, national origin, ancestry, sex, or physical or mental handicap. The major exception to this law is for "bona fide occupational qualifications in employment." This means that a potential employer can consider such things as the race, religion, and color of an applicant if they are necessary qualifications for the job in question. For example, a woman who is rejected for the part of Romeo cannot sue the theater company for sex discrimination under the state Human Rights Act. Being male was a necessary qualification for the job.

The Human Rights Act established a state Human Rights Commission which has the power and responsibility to make regulations in order to implement the Human Rights Act. It investigates claims, issues orders regarding claims of discrimination, and generally oversees problems involving discrimination in New Mexico.

In order to receive the protection of the Act, a person who believes he or she was discriminated against must follow certain procedures. Within ninety days after the alleged discriminatory act, a written complaint must be filed with the Human Rights Commission. The Commission then investigates the alleged discrimination, and makes a preliminary decision whether there was discrimination. If the Commission finds no discrimination the complaining person may get a review of the evidence. If the Commission finds there was discrimination, the Commission attempts to make a settlement between the parties. If this attempt fails, the Commission issues a formal complaint against the alleged discriminator. Then the Commission holds a hearing on the matter, which is less formal than courtroom trial. If the Commission determines from the evidence presented that the discriminatory practice has occurred, it can issue an order directing the discriminator to change its practices and it may order the discriminator to pay money to the complaining party. If the Commission finds no discrimination, the complaint is dismissed.

If either the alleged discriminator or the complaining party is displeased with the decision of the Commission, that party may appeal the decision in the New Mexico courts. The appeal must be filed within thirty days after notice of the Commission's order. In the court, both parties will have the opportunity to present their evidence all over again.

# Chapter 8

# Employment Law

As an average adult you will spend well over half of your daily waking hours at some kind of employment. You may be an *employer*, or one who hires, pays, and assigns work. More likely you will be an *employee*, one who is hired, paid, and assigned to work by your employer. As either an employer or employee, you should be familiar with the major laws that affect workers and regulate wages, hours, and working conditions.

### THE YOUNG EMPLOYEE

As a young employee in New Mexico, you should know to what extent state and federal employment laws protect you as a worker. Under a federal law, the Fair Labor Standards Act, employers that do a specified dollar volume of business and employ four or more workers must pay the minimum wage ($3.35 per hour) and cannot ask the employee to work more than 40 hours per week without paying overtime wages. There are many employers in New Mexico, however, that are exempt from this law, either because they do not qualify or because they have applied for an exemption.

If employers are not regulated by this federal law, they are regulated only by New Mexico law. Under New Mexico law, these employers are exempt from all minimum wage and overtime regulations if the employee is 18 years old or under and has not graduated from high school. In other words, if you are 18, and have dropped out of high school or are a senior, your employer doesn't have to pay you $3.35 per hour and he or she can require you to work as many hours as he or she wishes without paying you overtime. If you are 16 years of age or younger, state law requires that you work no more than eight hours a day or 44 hours a week. Both New Mexico law and the Fair Labor Standards Act prohibit minors from working at certain dangerous jobs.

As a young employee, you should be aware which laws regulate your employer in order to know what protections you have or do not have. This information can be obtained from the New Mexico Labor Commission in Santa Fe or the Federal Wage and Hour Division in Albuquerque.

Some laws of the workplace do apply to all employers and employees. For example, federal and state laws prohibit most employers from discriminating because of race, religion, color, sex, age, or national origin. Many employment laws are, however, special laws that protect people or remedy problems encountered only on the job. The laws and regulations that

**By law, how many hours can each work?**

**By law, how much can each earn?**

are explained in the rest of this chapter will serve as a guide to understanding your rights and obligations at the workplace.

## THE EMPLOYMENT CONTRACT

### Oral Contract

Jane reads an ad in the newspaper advertising job openings for short-order cooks at a fast-food restaurant in Albuquerque. She goes to the restaurant and applies for the job. She is interviewed by the manager of the restaurant, who decides to offer her the job at $3.35 an hour. She agrees to work for the wages offered and agrees to work during certain hours. She is issued a uniform and comes to work the next day.

Jane has just entered an *oral employment contract* with the restaurant employer. She made an oral contract because the only pieces of paper she filled out and signed were probably W-2 or W-4 forms to be filed by the employer with the Internal Revenue Service. These forms indicate how many tax deductions she will declare to determine how much income tax should be withheld from her weekly paycheck. The restaurant probably has no written rules governing behavior or discipline of employees on the job. The restaurant may tell Jane over a period of time that there are rules she is expected to follow, but they might not be written down. The rules might be vague or change from time to time. Jane can quit this particular job at any time and she will not have to give notice, although it is a good idea to do so. Job references may be important in the future. Jane can be fired at anytime for any reason, except a discriminatory one. Unfortunately, the individual employee with an oral employment contract has little protection from arbitrary acts by an employer.

### Written Contract

Jane might also have entered into a *written employment contract* with her employer that specified her wages and hours, rules concerning the job, sick, personal, or vacation leave policies, complaint procedures, grounds for discharge, and so forth. Contracts are usually written when an employee is paid a salary instead of an hourly wage. The written contract provides the employee with more protection from arbitrary acts by an employer.

### Collective Bargaining Agreement

Many employees work at a job where they are members of a union. When the union is elected by employees and recognized by the employer, the employees no longer negotiate individually for contracts. Instead, they negotiate through the union which represents them. As part of the terms of the contract, the union negotiates fringe benefits for employees such as pension plans or sick pay. The union also helps employees bring grievances to management. The contract entered into by the union and the employer is called a *collective bargaining agreement.*

Where there is collective bargaining, employees, through their union, and the employer share the responsibility for establishing orderly procedures for determining wages, hours of work, rates of production, promotion, lay-off and discharge policies, and just penalties for violation of work rules. Every union member receives a copy of the collective bargaining agreement containing these rules and policies.

## THE RIGHTS OF WORKERS

Workers won the right to organize in groups and join or form unions to bargain with employers after many years of legal struggle. The National Labor Relations Act (called the Wagner Act), passed by Congress in 1936, gave workers this right. Congress also created the National Labor Relations Board to enforce these laws. Under the Act, the following rights of workers are guaranteed:

(1) The right to self-organization;

(2) The right to form, join, or assist labor organizations;

(3) The right to bargain collectively through a representative of workers' own choosing;

(4) The right to act together for the purposes of collective bargaining or other mutual aid or protection; and

(5) The right to refuse to do any or all of these things.

In 1947, certain limitations were imposed on unions when Congress passed the Labor Management Relations Act (called the Taft-Hartley Act).

Until 1947, all unions in every state could make *union security agreements*, which are agreements between unions and management guaranteeing that all employees hired by management will join the union. Since unions are required by law to represent all employees when bargaining with management, the unions wanted all workers who were hired to join the union. Under the Taft-Hartley Act, Congress allowed states to outlaw union security agreements by enacting *right-to-work* laws. Under these laws, workers do not have to join unions, but still benefit from union-negotiated contracts without paying dues or contributing to the maintenance of the union. Right-to-work laws do not guarantee employment to a worker. They just allow a worker to be hired at a company with a recognized union without having to join that union, even though the union negotiates contracts for all the workers. Only 12% of the workers in New Mexico are members of unions compared to 20% nationally.

Twenty states have passed right-to-work laws. In New Mexico, voters defeated a referendum for a right-to-work law. Since then, a bill for such a law has come up at every legislative session and has been defeated, either by vote or governor's veto. Therefore, union security agreements are lawful in New Mexico.

## UNEMPLOYMENT COMPENSATION

Unemployment compensation is designed to ease the effect of joblessness on workers and their families. Although it was federal legislation that started the program, each state has its own individual unemployment compensation law, with its own qualifying requirements, benefit amounts, duration, and disqualifications. In New Mexico the maximum benefit is $117 weekly for a maximum of 26 weeks.

Not everyone is entitled to unemployment compensation if he or she is out of work. There are rules that determine who is eligible:

(1) You have to have worked for a certain length of time before quitting or being fired in order to collect unemployment. The Employment Security Division in your area can tell you what this time requirement is;

(2) You have to be able to work, to be actively seeking work, and to have filed a claim for compensation with the Employment Security Division in your area; and

(3) The reason for quitting or being fired must not be your fault.

In general, if you quit and had a good reason for doing so that is related to the job, or if you were fired and the reason was not some kind of misconduct on your part, you would be entitled to compensation. You are not entitled to compensation if you quit just because you don't like the job, or if you leave for purely personal reasons. Workers out on strike, for example, are not entitled to benefits even if they claim that the employer is unfair.

An employer can, and often will, fight the employee's right to receive such payments. The

reason for this is that an employer is required to pay a certain amount toward your unemployment benefits. The procedures for filing and receiving unemployment compensation can be explained by the Department of Employment Security in your area of the state.

## WORKERS' COMPENSATION

The right to these payments and the amount are regulated by the New Mexico Workmen's Compensation Act. Under this law, employers with five or more employees are required to carry insurance to cover injuries of workers. If you work for an employer with fewer than five employees, however, the employer does not have to carry insurance or guarantee compensation in the event of an injury on the job.

The Labor and Industrial Commission is the agency that regulates unemployment compensation. Procedures require that the employee submit a written report of the accident to his or her supervisor. There is a seven day waiting period. The amount of the benefits will be determined by a formula, usually a percentage of a worker's average earnings. The employer can appeal the amount to be paid to the Commission.

If you work for an employer with just a few employees, it is wise to ask what kind of coverage, if any, he or she has. Any questions concerning workmen's compensation can be addressed to the Labor and Industrial Commission. There are offices in Santa Fe, Albuquerque, Gallup, Las Cruces, and Carlsbad.

## SOCIAL SECURITY AND RETIREMENT

During the lifetime of a worker, employers pay a certain percentage of the worker's earnings to the federal government into a Social Security account to provide for the worker's retirement. Once a worker reaches age 62 or 65 (this may change), he or she is entitled to benefits based on the amounts accumulated in the Social Security account and on the average wages paid over recent years. Federal law determines the amount of the benefits. Under current law, a non-working wife can also receive benefits upon her husband's retirement or death. She can draw approximately 50% of the amount her husband receives when he retires. A divorced wife who has been married 10 or more years is also entitled to 50% of the amount her former husband draws or she can receive payments from her own account if it is greater. If she remarried, she will lose her ex-husband's benefits but will be eligible for a portion of those of her new husband. The local Social Security office can provide information about regulations. Anyone can write to the Social Security Administration in Washington, D.C. to find out how much is in his or her account.

**What should the worker do?**

The amount most people receive from Social Security is minimal and does not actually cover the cost of living on retirement. Most people therefore either save money, participate in a pension plan, buy annuities, or provide some other means of receiving additional income when they retire.

## OCCUPATIONAL HEALTH AND SAFETY

Health and safety on the job is protected by the Occupational Health and Safety Act. The goal of this federal law is to "assure so far as possible, safe and healthful working conditions to every employee in America and to preserve this country's human resources." OSHA sets standards for the use of safety equipment and the working environment. Many employers

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are exempt from this law, such as the federal government and employers with a small number of employees. If you believe your employer is violating the Act, you should report suspected violations to the Occupational Health and Safety Division of the Health and Environment Department in Albuquerque or Santa Fe. Inspectors can then come into a business or plant to investigate the reported violations. If an employer is found to have violated the law, the employer may be fined, ordered to correct the condition, or may have to pay damages to an employee in the event of an injury.

The United States Supreme Court has recently ruled that employers are prohibited from discharging or discriminating against a worker who refuses to work under conditions that threaten to cause death or serious injury due to job safety or health hazards. The employee must do certain things to preserve his rights in such a situation, but if your employer fires you, refuses to assign you to other work, or takes action against you, you may file a grievance. A Section 11 (C) complaint should be filed with the state OSHA office in Albuquerque within 30 days. You can also file an unfair labor practices charge with the National Labor Relations Board in Albuquerque within six months.

## EMPLOYMENT DISCRIMINATION

If you feel that you have suffered discrimination on your job, or where you applied for a job, because of your race, sex, age, color, religion, or national origin, there are federal laws that can help. Title VII of the Civil Rights Act of 1964 guarantees equal job opportunities to women and members of all racial and national groups. The Age Discrimination in Employment Act covers you if you are between the ages of 40 and 70. It is possible for you to sue some employers, a labor union, an employment agency, or a government agency that discriminates against you. If you win, you can be awarded money damages and back pay, and/or you may get your job back or get a promotion or raise if it was wrongfully denied you.

If you wish to file a charge of job discrimination, you must do so within 180 days from the time the discrimination took place. File with the Equal Employment Opportunity Commission (EEOC) under the Department of Human Services in Albuquerque or Santa Fe. The EEOC will investigate your case. Your employer is forbidden by law from harassing or bothering you in any unfair manner because you filed a charge.

Once you file your charge you must cooperate with EEOC investigators. Perhaps there will be a settlement. Perhaps the EEOC will issue a "right-to-sue" letter, which means that the EEOC has found that you have enough evidence to take your employer to court. You may need the help of a lawyer.

You should also file a complaint with the State Human Rights Commission in Santa Fe. Procedures are described in Chapter 7.

## GRIEVANCE PROCEDURES

Employers often have some kind of complaint procedure for resolving problems or grievances that arise on the job. The type of procedure depends on the kind of contract made. Where there is an oral employment contract there may be no grievance procedure at all or there might be an *informal grievance procedure.* In an informal procedure, the employee will complain to his or her supervisor or manager about his or her problem. The employer may also complain or warn an employee about defects in his or her work. The employee and supervisor try to work out the problems between them. The informal grievance procedure usually ends here.

*Formal grievance procedures* or systems are usually written down for the employee to read. Each employee may not necessarily get a copy of the detailed procedure, but may be told generally about it and where to obtain or see a copy. If the employees are unionized, the collective bargaining agreement will set out the grievance procedure covering the employees.

A grievance procedure may have one, two, or all of the following steps:

**Step One:** The employee may be told to complain to his or her immediate supervisor.

**Step Two:** If the problem cannot be resolved between the employee and the immediate supervisor, then the employee may be able to complain to a higher level of management. Grievance procedures that have only steps one and two are generally known as "open door" systems. They are fairly informal and are resolved through negotiation between the specific parties.

**Step Three:** This step allows an appeal of a grievance to an independent third party in a company, which may be a labor director, an officer, or sometimes a panel of employees. This is a formal grievance procedure and is usually written in the employment policy. It is usually followed only after the grievance has been put into writing, taken to an immediate supervisor, and appealed to a

higher level of management. The third party opinion is only advisory. The employer does not have to follow it.

**Step Four:** This step can only be taken by employees who are unionized. When a union and employer negotiate a collective bargaining agreement, they always include in a contract an additional means for solving disputes called *arbitration.* Arbitration is a hearing somewhat like a court proceeding. The arbitrator is the judge. The arbitrator's function is to interpret and apply the employment contract to the particular dispute, and to resolve the problem based on the evidence presented and the terms of the contract. The employee or the employer must go through the preliminary grievance steps before deciding to demand arbitration. The grievance procedure established in a collective bargaining agreement usually states that the arbitrator's decision is *binding on everybody.*

**PROBLEM 1**

John Barton has been with the Company eight years and has a good record. In fact, he was offered a foreman's job once, but turned it down. John did not come in to work on Monday and did not notify the foreman. If his job does not get done, the rest of the department falls behind, and the foreman had a hard time finding someone to put on his job. John came in on Tuesday, but Wednesday he was out again and did not give the foreman any notice. When he came in Thursday, the foreman fired him.

John's wife and baby have been sick. He stayed home Monday to take care of them. Tuesday his sister-in-law came over and stayed with them, so he came to work. Wednesday, however, the sister-in-law did not show up, so he stayed home again. He lives on the outskirts of town and has no telephone.

The contract reads, "A worker absent twice without notice is subject to discharge."

1. *Does the employee have any rights in this situation? What action might he take?*

2. *Was the foreman justified in firing the employee? Why or why not?*

3. *Role-play an encounter between the foreman and the employee in which the employee tries to get his job back.*

**PROBLEM 2**

A company hires new workers by telling its current employees, who are all Anglo, when there are job vacancies. The result is that only friends and relatives of current employees learn of job openings, only friends and relatives are hired, and almost all the new employees are also Anglo.

1. *Does this practice constitute job discrimination? Why or why not?*

2. *If a non-Anglo applied for a job at this company and was not hired, could he or she claim discrimination? What would be the remedy, if any?*